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CONTENTS

I. Factors in the Development of the Late Classical Law
A. Arthur Schiller 1

II. New Studies on the Roman Law in Gratian's Decretum
Stephan Kuttner 12

III. Benefit of Counsel in Britton ..... Marvin Becker 51

IV. From Contract to Status ..... Kasimierz Grzybowski 60

V. The United Nations and Our Interamerican System
Héctor David Castro 82

Notes and Reviews

A Preliminary Report on the Project of a General History of Roman Law in the Middle Ages 89

Caes and Henrion, *Collectio bibliographica operum ad ius Romanum spectantium*, II ..... Hans Julius Wolff 102

A New Dictionary of Roman Law 103

Argentine Society of Roman Law 103

The Riccobono Seminar of Roman Law in America 104

SEMINAR

Volume XI 1953

FACTORS IN THE DEVELOPMENT OF THE LATE CLASSICAL LAW *

THE study of Roman law has risen like a phoenix from the ashes of the war. Never before has there been such an abundance of research effort in all areas of the subject. New institutes have been founded, new periodicals have been established, and the old institutes and journals have been revived after a period of darkness. There has been extensive re-examination of the nature and the institutions of the archaic period.[1] And, near the other end of the time sequence, several scholars have suggested the existence of a corps of editors in the late third and early fourth centuries of our era, to whom the substantial revision of the works of the classical jurists is attributed.[2]

To my mind, even more intriguing are the occasional references in the newer writings to a variety of factors that seem to point to a fundamental modification of the Roman legal system in the late classical period. No one has attempted to delve deeply into all the facets of this problem. There is an implicit reference by one writer, a suggestive thought in another, a problem posed by a third. In this address an attempt will be made to gather the threads and to outline in broad strokes the various matters which may be indicative of a de-

* Magisterial address delivered at the annual convocation of the Riccobono Seminar of Roman Law, Catholic University, Washington, D. C., May 19, 1953.

[1] A fundamental work in this field is Kaser, *Das altrömische Ius* (1949).

[2] The names of Schulz, Wieacker and Wolff are prominent in this endeavor; for a critical evaluation of the "revisionist" theories, see Kaser, in *Savigny Zeitschrift, Rom. Abt.* 69 (1952), 60ff.

cided change in the techniques and in the substance of the Roman law in the time of the Antonines and the Severi.

The vast majority of writers designate the period from Augustus to the middle of the third century as the classical epoch of the Roman law.[3] Others contend that the classical period extends from approximately 150 B.C. to 250 A.D., a view recently substantiated by Professor Wieacker.[4] Within this time there may be distinguished the pre-literary era to the close of the Republic, and the literary epoch during the Principate. The whole period is classic: unity in the formulation of the concepts of the ius civile, simplification of external forms by ever-increasing juristic activity, and theoretical exposition of a few legal concepts. In the literary sense there is concise expression, emphasis on a limited number of institutions, and compilation of organized encyclopedic works. Of this classical period, then, it is proper to speak of the years from the reign of Hadrian to that of Phillip as the late classical period. Within this age lived the so-called high classical jurists of the time of the Antonines and the late classical lights of the era of the Severi.[5]

The crucial factor that distinguishes the late classical era from that which precedes it is the position and influence of the emperor in the field of law. The beginnings of the new epoch are clearly to be assigned to the efforts of Hadrian, during the closing years of his reign, as has recently been suggested.[6] Reference need only be made to the codification of the edict, the establishment of a permanent consilium of the leading jurists, the reorganization of the imperial bureaus, and the broadening in scope of the cognitio procedure. There are other developments of a constitutional nature in the years that

[3] E.g., Schulz, *History of Roman Legal Science* (1946), 99, with further references.

[4] *Über das Klassische in der römischen Jurisprudenz* [Recht und Staat, Nr. 151] (1950).

[5] So designated, for example, by Kaser, *Römische Rechtsgeschichte* (1950), secs. 42, 43.

[6] Vogt, in *Festschrift Fritz Schulz,* (1951), II, 193, 197ff.

followed, culminating, in a sense, in the constitutio Antoniniana of 212 A.D., each of which reflects a continuing imperial policy to bring the administration of justice under the control of the emperor. Let us now dwell in greater detail on the diverse elements that determined the nature of the late classical law.

It seems that the purely private position of the jurists was altered by an act of Augustus. At least, this is the meaning attributed by most students to the granting of ius respondendi to individual jurists by the emperor.[7] If this is correct, most of the jurists of whom we know from Augustus to Hadrian, were " patented " jurists. But subsequent to the reign of the latter no mention is made of ius respondendi ex auctoritate principis. What happened to the imperial approbation? It seems that from this time on the leading legal lights were drawn into the council of the emperor, the consilium principis.[8] From the earliest years of the Principate the emperor had called in advisors to aid in carrying on the manifold duties of the head of the state. Now, however, a permanent body was created with the jurists called in from time to time in order to fashion the judicial policy of the empire.

Concomitant with the stabilization of the consilium was the reorganization of the administration of justice in the city Rome. The chief judicial magistrate had been the praetor, in whose hands lay the power of granting or denying an action to prospective litigants, and of authorizing the lay-person judge to hear and decide the case submitted to him. To quote the words of Papinian, it was the praetor who " introduced the ius praetorium (known as ius honorarium from the office of the praetor) for the purpose of adding, supplementing or correcting the ius civile." [9] This ius honorarium depended on the edict of the praetor, for it was by pronouncement of what

[7] The recent literature is cited by Berger, *Encyclopedic Dictionary of Roman Law* (1953), s.v. *ius respondendi.*

[8] Cf. Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (1952), 269ff.

[9] Dig. 1.1.7.1.

causes of action would be entertained that this magistrate was able to accommodate the law to the needs of the time. Now Hadrian called upon the jurist Salvius Iulianus to compile the edict. This act, a codification of the edict, brought to an end the creative activity of the praetor.[10] This does not mean that Roman law ceased to evolve new forms and new institutions. Other officials gained increasing competency over private litigation.

The earlier emperors had appointed officials — not magistrates in the old sense but civil servants of the empire — to supervise various activities within Rome and in Italy and in the provinces. In Rome the most important of these were the praefect of police, the praefect of the grain supply, and the mayor (praefectus urbi). These officials had jurisdiction over crimes and in the latter half of the second century gained competence over civil disputes.[11]

The process utilized in these cases was known as cognitio procedure, extra ordinem, in other words, not the regular bipartite formulary procedure. The emperor himself exercised judicial powers, and gradually there grew up a hierarchy of courts alongside the typical bipartite procedure. In fact, by the third century, appeal was granted from the decisions of the iudex to the imperial courts, a complete denial of a basic concept of old Roman justice, namely, the right of Roman citizens to have their disputes settled by another private Roman citizen.[12] In the cognitio procedure an official of the state heard the case from start to finish.

From the time of Augustus the emperors had themselves elected to various of the old Republican magistracies, and exercised the functions of these posts. In addition, in the course of time the pronouncements of the emperors came to have the force of law. Three types of these pronouncements

[10] De Francisci, *Storia del diritto romano,* vol. II (2nd ed., 1938), 460ff.

[11] Cf. Schiller, in *Bullettino dell' Ist. di Diritto Romano,* 57/58 (1953), 60ff.

[12] Generally on appeal, see Orestano, *L'appello civile in diritto romano* (Corso 1951/1952); specially on appeal of formulary procedure cases, 197ff., 213ff.

were termed constitutiones by the Roman jurists: edicts, decrees and rescripts. To these is now added a fourth: the mandates. Edicts may be likened to executive orders, decrees were the decisions rendered in the cases heard by the emperors, mandates the " portfolios " transmitted to the provincial governors for their guidance.

Rescripts, at the start, were the answers given by the emperor—or by the staff of slaves and freedmen assigned to the task—to the host of petitions directed to him from all parts of the empire. Hadrian, elaborating upon a scheme dating back to the emperor Claudius, set up two bureaus to handle this correspondence.[13] One, the bureau ab epistulis, was entrusted with answering the letters addressed by public authorities. The other, the bureau a libellis, had the task of providing answers to the queries put by private individuals. Both types of answers were loosely termed rescripts. These two bureaus formed part of an organized secretariat. There was also a bureau a cognitionibus, concerned with the preparation of the papers involved in a trial before the emperor's court, and there were other bureaus, changing in number and tasks over the years.

Each of these bureaus was composed of a lower staff of slaves and of freedmen and free persons, while the higher posts were held by members of equestrian rank. These last, the higher positions, were stages in the career of the public servant, a regular equestrian (in contrast to senatorial) cursus honorum, involving bureau posts, praefectural offices in Rome, assignments as imperial procuratores in the provinces, and eventually for some, appointments as provincial governors or praetorian praefect. There had been a military apprenticeship for this equestrian career, but Hadrian here again instituted a new element: legal training for men destined for administrative—judicial posts.[14] It seems natural that the jurists of the

[13] Cf. generally Hirschfeld, *Die kaiserlichen Verwaltungsbeamten bis auf Diocletian* (2nd ed., 1905), 318ff.; briefly Schiller, *Seminar*, 7 (1949), 26ff.

[14] Hirschfeld, *op. cit.*, 426ff. Cf. Kaser, *Römische Rechtsgeschichte* (1950), 160.

age of the Antonines and the Severi—all but one of whom were of the equestrian class—frequently held one or another, or even a succession of these positions at some time during their lives.[15] Maecianus, for example, was an assistant to the chief of public works, head of the bureau a libellis, praefect of the grain supply at Rome, and governor of Egypt. In addition, he was intermittently a member of the imperial council under Antoninus Pius and the joint rulers, Marcus Aurelius and Lucius Verus.[16]

The most important of the bureaus from the point of view of the development of the law was the bureau a libellis; important because gradually most of the petitions directed to this bureau contained requests for the determination of questions of law posited upon a given set of facts. The petition was handled by the bureau, and the answer given posted at the imperial residence for the information of the petitioner. Among the papyri found in Egypt are instances of copies of these posted rescripts,[17] and many of the earliest imperial enactments contained in the Code of Justinian are of the same type.[18] While most of the answers given were declarative of the existing legal norms, some undoubtedly established new rules of law. This bureau a libellis, then, took the place of the praetor in "aiding, supplementing or correcting" the law to meet new situations.

Rescripts were directed to the provinces, just as the other forms of imperial enactments were largely concerned with provincial affairs. Thus we come to the final factor which gave a new character to the Roman law, namely, the relation of the provinces and the provincials to the central authority. This

[15] Schiller, *Seminar*, 7 (1949), 39ff.; Kunkel, *op. cit.*, 290ff.

[16] Kunkel, *op. cit.*, 174ff.; Stein, *Die Präfekten von Ägypten in der römischen Kaiserzeit* (1950), 88ff.

[17] The imperial constitutions on papyri are noted by Taubenschlag, *Journal of Juristic Papyrology*, 6 (1952), 121ff.

[18] A typical example is C. 3.32.1 of 210 A.D., addressed by the emperors Septimius Severus and Antoninus Caracalla to Cecilia, and posted the 5th of May, at York, England.

central authority was in name the emperor, but in fact it was the council of the emperor, the imperial chancellery, and the Roman officials who represented the emperor within the province itself.

We are all familiar with the fundamental contribution of Ludwig Mitteis to our understanding of the nature of Roman law in the provinces, namely, the distinction between imperial law (Reichsrecht) and folk-law (Volksrecht).[19] The former was the legal system afforded an ever-increasing number of provincial subjects—sometimes whole communities—to whom was granted the status of Roman citizenship. The latter was the law of those subject peoples who were permitted to retain local autonomy of their own city-states; perhaps we may speak here of local law. As a result of the studies of Professor Schönbauer a third category is now added, that of provincial law.[20] This is the law legislated by Roman authority, either at Rome or by provincial officials. It was effective upon all or a particular segment of the provincial population, and superseded local law if such were in conflict.

Roman magistrates and Roman courts in the provinces were constantly concerned with the principles and the application of at least two of these categories, imperial law and provincial law. And inasmuch as the newly-created Roman citizens were likely to prefer to be regulated by Roman rules in the law of persons, family and succession, these same officials and courts were perforce dealing with Roman private law.[21] Not that this imperial or provincial or "Roman" law was the old ius civile. It was rather Roman law evolved through rescripts and other imperial enactments, and by the decisions of Roman courts in Rome or in the provinces.

Our sources indicate that Roman magistrates and courts had close contact with the law practiced in the provinces. Many

[19] *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (1891).

[20] *Savigny-Zeitschrift*, 57 (1937), 309ff., and particularly 351ff.

[21] Generally, see Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, I (1944), 19ff.

of the provincial officials with a background of legal training in Rome now acted as judges in provincial cases.[22] Similarly, the heads of the bureaus at Rome were primarily concerned with the law of the provinces. In fact a part of the secretariat accompanied the emperor when he made his grand tour through the provinces. Thirteen rescripts in a Columbia papyrus, shortly to be published, were " posted at Alexandria " while the emperor Septimius Severus was in residence.[23] And the language of these decisions is clearly that of the imperial chancellery, drafted by a bureau official thoroughly familiar with the current status of the Roman law. " Posted at York " in a constitution of the Code of Justinian means that the rescript was issued there, when Septimius Severus was in Britain.[24] In sum, it may be stated with certainty that the knowledge of provincial law, whether the imperial Roman law, or that of city-states, or that of particular provinces, was well-known to the legal profession, both official and private, in Rome itself. Thus we should expect that these new fields of law would be reflected, to some extent at least, in the writings of the Roman jurists of the late classical era.

It cannot be doubted that the Roman jurists of the late classical period had a special interest in the newly-fashioned Roman law. They took such a prominent part in its development. It was a cosmopolitan rather than a city law, ius novum as it is sometimes called.[25] The constitutions of the emperors and the doctrines developed in the imperial courts, both at Rome and in the provinces, added a wealth of material to the corpus of the older ius civile and ius honorarium. But

[22] Even an organized *consilium* to aid the praefect of Egypt in his judicial functions is now vouched for, cf. Balogh and Pflaum, in *Revue historique,* 30 (1952), 117ff.

[23] *Apocrimata: Decisions of Septimius Severus on Legal Matters (P. Columbia 123),* Text, Translation and Historical Analysis by W. L. Westermann, Legal Commentary by A. Arthur Schiller; to be published June 1954.

[24] C. 3.32.1, referred to *supra,* note 18.

[25] The nature of the ius novum has been well summarized, recently, by Riccobono, *Lineamenti della storia delle fonti e del diritto romano* (1949), 142ff.

collections of constitutions or of decisions of imperial courts are infrequent among the writings of the prominent jurists. Papirius Iustus, the author of a work entitled Constitutions, may well have been an official of the secretariat archives.[26] The work of the jurist Paul entitled Imperial Decisions seems to have been a selection of cases of the imperial court in which Paul himself had participated.[27] The jurist, generally, did not depart from the traditional categories of juristic writings, but he did incorporate the material into the well-established forms.

Gaius wrote a commentary on the provincial edict in thirty-two books, in addition to a commentary on the praetor's edict. Ulpian's encyclopedic treatise on the edict of the praetor included the text and commentary upon a number of rescripts which modified the codified edict.[28] The commentaries of the late classical jurists on the ius civile refer to the new doctrines that were being evolved in second and third century Roman law.[29] Even more prominent was the new material in the compilations of opinions of the jurists variously termed Responsa, Quaestiones and Disputationes, or in the form of writing known as Digesta. These collections in earlier times had been the answers to legal questions arising in cases in the normal Roman formulary procedure. From the time of Papinian on, at least, these collections include decisions on law arising from disputations among jurists in the imperial council, or connected with litigation pending in the imperial courts.[30] Thus new law intermingled with the old.

There was a departure from the traditional forms of writing in the monographs of the late classical period. Many shorter

[26] So Schulz, *History of Roman Legal Science* (1946), 153.

[27] Schulz, *op. cit.*, 154.

[28] Cf. Jörs, *RE.*, s.v. *Domitius* (87), V, 1435, 1439ff., 1502ff.

[29] Cf., for example, the inclusion of legal principles affecting the praefects of Rome, Schiller, *Bullettino* 57/58 (1953), 60, 90f.

[30] Although one need not go so far as Samter, *Nichtförmliches Gerichtsverfahren* (1911), 9-63, and attribute most responsa of the late jurists to decisions rendered in connection with cognitio cases, there can be no doubt but that such decisions were included in the writings of these jurists.

works on single topics may be nothing more than extracts from larger commentaries. But there are some which were written as independent monographs, on single topics within the ius novum, and not readily treated in the traditional works, e.g., on fideicommissa, on hypotheca, on appellate procedure, and on criminal and military law. More significant was the development of an entirely new form of legal literature destined for a new audience, practically all of which was limited to the period of the Severi. This was the juristic writing on administrative law. There were monographs on the duties of the officials holding posts created by the emperor. Ulpian's work on the office of the provincial governor was an exhaustive compilation and critical evaluation of the legal materials, primarily rescripts and mandates, which should be at the hand of this high Roman official. The extracts we have, in the Digest and in minor works, indicate that not only did Ulpian have access to official archives and familiarity with bureau practice, but that he had a sound and deep understanding of the legal principles evolved.[31] Another subject within administrative law is instanced by the works of Paul, Ulpian and Modestinus on the praetor tutelarius, the special praetor named to hear cases involving guardianships and particularly the claims to exemption from the onerous duty required of a person appointed to the post. Modestinus' work, written in Greek to bring the knowledge of the new Roman law to the eastern half of the empire, quotes the actual words of the pertinent constitutions for use in court if necessary.[32]

I have attempted in this address to present in outline the factors in the evolution of the Roman law of the late classical period which gives it a character quite distinct from the law of the earlier classical times. It is not necessary to repeat the diverse elements that laid the basis for the ius novum. But it

[31] Schulz, op. cit., 243ff.

[32] On *postulatio* instant in the Roman law in the eastern provinces and translation into Greek, see Kunkel, op. cit., 266ff.; Taubenschlag, in *Festschrift Schulz* (1951), II, 189ff.

should be emphasized that the jurists to whom we owe the bulk of our information on the Roman law were participants in each of the activities which has been described. The time is ripe, it would seem, to attempt to identify that portion of the jurists' writings in the Digest which may be considered a compendium of the traditional ius civile and ius honorarium, and that part which was developed in late classical times, the product of council policy, bureau practice, cognitio procedure, and contact with the provinces. The task will not be easy. The jurists are prone to embody the new doctrine in old forms: a jurist's responsum may just as well be the advice given the mayor of Rome or the governor of a province respecting a case before him, as the true responsum of older days, the answer to a question of law arising within the scope of the formulary procedure. But until we can isolate the cosmopolitan Roman law of the age of the Antonines and the Severi, we shall not have a picture of the interrelation of law and social and economic life of the later Principate.

A. Arthur Schiller

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NEW STUDIES ON THE ROMAN LAW IN GRATIAN'S DECRETUM

I

THE recent celebrations of the eighth centenary of the *Decretum Gratiani* at Bologna and Rome, 17–22 April 1952, have focused once more the interest of legal historians on the all-important work of the "Father of the Science of Canon Law." The fact that after nearly four hundred years of canonistic erudition since the days of the *Correctores Romani* we still do not have a satisfactory critical edition of the *Concordia discordantium canonum* has been often lamented;[1] and the resolutions taken at the commemorative convention[2] give promise for the first time of an organized, international cooperation of scholars toward this formidable task. Encouragement for such an enterprise came from the lips of Pope Pius XII in his allocution of 22 April 1952:[3]

> . . . It is evident that the edition of the *Correctores Romani* should remain in the large collection which constitutes the *Corpus Juris Canonici.* But there is nothing to prevent the preparation for printing of a new critical edition, as certain scholars have laudably proposed; in fact, it is altogether de-

[1] Cf. the present writer's "De Gratiani opere noviter edendo," *Apollinaris* 21 (1948) 118-28.

[2] Cf. *The Jurist* 12 (1952) 396 f.

[3] *Acta Apost. Sedis* 44 (1952) 375; English text from *The Jurist* 12.270 f. The translation in *The Jurist* is based on the Latin text which appeared in *L'Osservatore Romano* on 23 April 1952, and consequently repeats some of the minor verbal mistakes of this printing, which later were corrected in the official text of the *Acta* (where, however, the allocution is erroneously dated of 29 April). It should therefore be mentioned that the Holy Father, in treating of the decretists of the twelfth and thirteenth centuries, spoke of "the Bolognese, French, Anglo-Norman (not: Anglo-Saxon, as in trans. p. 267), and Spanish schools"; and again, of "the golden age . . . of classical canon law, especially in Bologna, Paris (not: Pavia, as in trans. p. 269), and other Universities."

> sirable. . . Such a critical edition should be prepared in keeping with the demands of present-day scholarship, since the edition of Friedberg, notwithstanding its undeniable merits, no longer measures up to the wants of ranking experts in the history of canon law. . .

Prout nunc temporis ars et ratio exigit: textual criticism in many fields of medieval research has come to recognize that the really intricate problems are presented not so much by the corruptions of a finished text at the hand of later copyists as by the "internal" history of a given text. We may be faced, e.g., with successive editions published by the author; with works that show traces of rewriting, or of substitution or interpolation of fresh matter by the author in the course of revising again and again his first draft (here Peter Lombard [4] or Bracton [5] come easily to mind); with publication by pupils from lectures which the master never cast into definite literary form, etc. Phenomena of this kind are by no means unknown to students of ancient literature—Aristotle's *Metaphysics* are a case in point [6]—but occur far more often in medieval writing, particularly with works of the schoolmen, in the wider meaning of the term, destined for the classroom or practical consultation.[7] In their case, matters are further complicated by the fact that we have to do with *textes vivants*, upon which the author himself and subsequent generations of scholars and scribes felt free to "improve" by addition or subtraction.

[4] A. Landgraf, *Einführung in die Geschichte der theologischen Literatur der Frühscholastik* (Regensburg 1948) 94 f.; cf. D. Van den Eynde, "Nouvelles précisions chronologiques sur quelques oeuvres théologiques du XII[e] siècle," *Franciscan Studies* 13 (1953) 114 f.

[5] H. G. Richardson, "Studies in Bracton," *Traditio* 6 (1948), 61-104, esp. 87 ff., 93 ff., 100 ff.

[6] W. Jaeger, as cited by F. Schulz, *History of Roman Legal Science* (Oxford 1946) 157 n. 1; I do not feel competent to pass judgment on Schulz's brilliant thesis (p. 160 ff.) which regards the *Institutes* of Gaius as lecture notes published after Gaius' death.

[7] Cf. e.g. E. Gilson, "Doctrinal History and Its Interpretation," *Speculum* 24 (1949) 486 f.

The history of the *paleae,* for instance, in Gratian's *Concordia* reflects to a large extent the critical attitudes of the several schools of decretists of the twelfth and thirteenth centuries towards the work of the Master; attitudes expressed both by the addition of new authorities (at first in marginal notes, comparable to the *Authenticae* of Irnerius and his school, entered in the manuscripts of the Code) and by marking off or omitting duplications and other "chaff" among Gratian's texts.[8]

The more we realize that Gratian's work is not likely to have been composed and published in one magnificent thrust, the less can we share the optimism of earlier generations of scholars who believed that one may easily arrive at the "original" shape of the book by merely counting and tabulating the *paleae* in the manuscripts. Such reasoning must fail in particular since we have to reckon with an early beginning of the process of eliminating original duplicates, and no criteria for distinguishing these from intruded-and-dropped ones have as yet been evolved.[9] While the heuristic value of manuscripts with a low number of *paleae* remains unquestionable,[10] the critical problems that arise in the twilight zone between original revisions and early accretions cannot be solved by them alone. To find here the golden mean between a mechanical tabulation of variants and the flight of fancy—which elsewhere has so often discredited higher criti-

[8] F. Gillmann, "Paucapalea und Paleae bei Huguccio," *Archiv für katholisches Kirchenrecht* (AKKR) 88 (1908) 466-79; A. Vetulani, "Ueber die Distinktioneneinteilung und die Paleae im Dekret Gratians," *Zeitschrift der Savigny-Stiftung* (ZRG), Kanon. Abt. 22 (1933) 346-70; "Les manuscrits du décret de Gratien conservés dans les bibliothèques polonaises," *Revue historique de droit français et étranger*[4] (RHD[4]) 15 (1936) 344-58, esp. 353 ff.; A. Van Hove, *Prolegomena* (Comm. Lovaniense in Cod. iur. can. I 1; 2nd ed. Malines-Rome 1945) 342; and W. Ullmann's paper, "The Paleae in the Cambridge Manuscripts of the Decretum," presented at the Congress of 1952 and just published in *Studia Gratiana* I (Bologna 1953) 161-216. (By the author's courtesy I was able to use a set of proof sheets before publication.)

[9] Vetulani, in RHD[4] 15.355 f.

[10] *Ibid.* 345 f.; Kuttner, *loc. cit.* (n. 1 *supra*) 120.

cism—is not always easy. At times, nothing but internal criteria will remain to establish the traces of an early reworking undergone by the extant text. Thus, e.g., the dictum of Gratian after c.3 D.25 shows an original plan of proceeding as follows:

> Nunc autem per singulos gradus ordine recurrentes, qui, ex quibus ordinibus, in quem gradum conscendere possint; qui post lapsum ualeant reparari, uel non; quibus culpis a proprio gradu mereantur deici; quo accusante, quibus testificantibus possint conuinci; cuius sententia sint soluendi uel dampnandi, breuiter consideremus,

—a plan which must have been abandoned at an early stage of the work. The inconsistency of the dictum with the actual shape of part I was of course noticed by the glossators; [11] but there exists no shred of evidence that Gratian ever got to the point of drafting a treatise corresponding to the program he announced.[12] Any attempt at reconstruction would be foolhardy.

Or again, at the end of D. 31 Gratian interprets a number of canons, as is his wont, quoted in the preceding discussion; the last of these, however ("Illud quoque Martini papae: *Si subdiaconus secundam duxerit uxorem,* non dissimiliter intel-

[11] *Summa Parisiensis ad loc.*: ". . . quae diligentius in causis quam in distinctionibus exsequetur" (ed. T. P. McLaughlin, Toronto 1952, p. 26); cf. F. Gillmann, "Einteilung und System des Gratianischen Dekrets . . .," AKKR 106 (1926) 525, where many other relevant texts are cited *passim*; see esp. Huguccio *ad loc.* (pp. 562-3; also on D.60 pr.: p. 565), on whom the *Glossa ord.* here is based (p. 572). For the text of *Summa Antiquitate et tempore* see AKKR 112 (1932) 519 n. 2. On Gratian's word *breviter*, Huguccio and *Glos. ord.* note ironically: "i. e. usque ad xii. causam."

[12] While the first items of the proposed disposition may be recognized in portions of pt. I (*qui*: D. 25-49, D. 51-59; *ex quibus ordinibus*: D. 60-61; *reparatio post lapsum*: D. 50), the rest has been submerged in the superimposed order of *negotia* in pt. II. Of the *culpae* deserving deposition only simony has remained (C. 1); accusers and witnesses are dealt with in the course of C.2-6 (on procedure), and the competent judge, in C. 7-11 (on bishops). An untenable interpretation of our dictum is found in R. Sohm, *Das altkatholische Kirchenrecht und das Dekret Gratians* (Leipzig 1918) 28 ff.

ligendum est"), has up to this point not been seen by the reader and is found only as D.34 c.17: an incongruity which prompted the author of the *Summa Parisiensis* to consider this sentence as added by Gratian after the completion of his book.[13] Then, there is the epilogue of pt. I, D. 81-101, with its ample reconsideration of matter already treated, thus indicating a rather fitful working method.[14] But who will say that there ever existed one finished copy not containing it?

The prudent critic will do well to limit conjectural reconstruction to the instances in which internal evidence is borne out by some external signs of textual or transcriptional disturbance in the manuscripts.[15] Without such restraint, he might find himself easily presenting hypotheses as facts.

Such disturbances have been found of late, e.g., by Mme. Rambaud and by the Abbé Guizard in a number of Paris manuscripts with regard to the transmission of both the *tractatus de poenitentia* and the *tractatus de consecratione*.[16]

[13] ". . . datur intelligi quod post ordinationem huius operis quasdam apposuit determinationes" (p. 31 McLaughlin, cf. introd. p. xi). Elsewhere the *Summa* considers part of a dictum (C.35 q.2 & 3 p.c.21) as added by the masters of Bologna (cf. pp. 262, xi); probably a conjecture based on a misunderstanding of the commentaries *ad loc.* of Rolandus Bandinelli (*Stroma* ed. F. Thaner, Innsbruck 1874, p. 214), Rufinus (*Summa* ed. H. Singer, Paderborn 1902, p. 519), Stephen of Tournai (ed. Schulte, Giessen 1891, p. 253).

[14] See Rufinus' criticism of Gratian, ad D.81 pr. (p. 170 f. Singer), and the rejoinder by the *Summa Antiquitate et tempore* (quoted by Gillmann, in AKKR 112.525 n. 1).

[15] A case in point: C.13 q.2 p.c.7, in discussing funeral rights and bequests, Gratian refers to a specific rule *secundum Leonem* as if known to the reader, i.e., to Leo IX's decretal *Relatum* (JL 4269), which must have been somewhere near this point in his original draft and is indeed found here (in varying positions) in several manuscripts, but not in the best ones nor in the vulgate tradition. Other manuscripts, however, insert here, or after c. 12, the decretal of Urban II, *Mortuorum* (JL 5775); cf. *Notae Corr. Rom.* and Friedberg (n.90) *ad locc.* The matter puzzled the early glossators (cf. testimonies collected by McLaughlin, *Sum. Par.* p. xiv, to which add Rufinus, C.13 q.1, p. 334 Singer) as well as the *Correctores*. We have to do with obvious traces of multiple recension.

[16] J. Rambaud-Buhot, "Plan et méthode de travail pour la rédaction d'un catalogue des manuscrits du Décret de Gratien," *Revue d'histoire ecclésias-*

They bear out the misgivings scholars have felt, almost since the earliest times, about the disproportionate length and digressive nature of the *De poenitentia,* which throws C.33 q.3 out of all balance; similarly, the serious discrepancies in the manuscript tradition of the *De consecratione* [17] should be viewed in conjunction with the well-known fact that this treatise (pt.III) differs from the rest of Gratian's work by the absence of all *paragraphi,* i.e., by altogether abandoning the dialectical procedure of *concordia discordantium canonum.* The French scholars' new researches, then, allow us a glimpse into early stages of recension in which, to say the least, neither C.33 q.3 nor the matter following upon C. 36 had as yet been given their present form.

The most remarkable methodical advance, however, and the most startling discovery which modern decretist scholarship has made to date came from the enforced leisure of a distinguished Polish scholar in a Swiss internment camp during World War II: this is Adam Vetulani's article on "Gratien et le droit romain," which appeared in 1947 [18] and has opened up entirely new roads to an understanding of the composition of the Decretă. With little else but a copy of Friedberg's edition at his disposal, Vetulani was able to demonstrate that, contrary to the traditional view, an extensive direct use of the sources of Roman law was not part of Gratian's original plan, and that the numerous excerpts from Justinian's codification were inserted only at a late stage of redaction. Further, since the composition of these texts shows the skill of a trained civilian, the question arises whether in its final shape Gra-

tique 48 (1953) 213; "L'étude des manuscrits du Décret de Gratien conservés en France," *Studia Gratiana* I 121-146; and L. Guizard, "Les manuscrits du Décret de Gratien de l'Université de Paris," to appear in Vol. II of *L'Année canonique.*

[17] Even Friedberg's best MS, Cologne 127 (= A) has some peculiarities, cf. proleg. col. xcv.

[18] RHD[4] 24-25 (1946-47) 11-48; the date-line reads *Camp d'internement militaire en Suisse, 1944-45.*

tian's book must not be considered the work of a team rather than an individual—a hypothesis not to be rejected *a limine,* as Pius XII has said,[19] but for which no direct proof can be expected to be forthcoming from our sources, whereas sufficient internal and external evidence is on hand to warrant Vetulani's conclusions regarding the late introduction of the Roman law matter. It is worth while to recapitulate the main lines of his argument.[20]

II

If we eliminate the surprisingly few Roman texts Gratian took over from intermediary sources, i.e., from previous canonical collections (Vetulani counts 22 fragments altogether), there remains some 200 fragments of Justinian law, distributed in 46 original units of composition, i.e., 46 *capitula* or *dicta* (*paragraphi*) [21] as they appear in the early manuscripts, not in the arbitrary division and numbering of the printed editions. (E.g., cc.126-130 of C.1 q.1 are actually one with c.125; or C.3 q.7 dict. p.c.1—c.2—dict.p.c.2 are one, etc.) Some of these original chapters follow each other immediately (Nos.1-2, 10-13, 36-37, 42-43 of the chart): this means that the Roman texts are actually concentrated in only 40 places. The fragments all come from the Digest, the Code, and the *Authenticae* of the Bolognese vulgate of the Code; none from the *Epitome Iuliani* and the Institutes; one exceptional chapter from the *Authenticum* (2 q.6 c.28: *Nov.*23 = *Auth.* 4.2).[22] The texts are often put together, mosaic-fashion, from

[19] Allocution of 22 April (n. 3 *supra*), *Acta AS* 44.373; *Jurist* 12.268.

[20] In the following, Vetulani's basic article (n. 18 *supra*) will be referred to by initial and page; the supplementary article, "Encore un mot sur le droit romain dans le Décret de Gratien," *Apollinaris* 21 (1948) 129-34, by the siglum *Ap.* and page.

[21] See the chart; the difference in numbers from Vetulani's original 42 (V. pp. 16-28) is explained below, IV A. The 22 texts from pre-Gratian collections are listed in V. p. 14 (correct there Ivo, *Panormia* VI, 127-131 to IV, 127-131).

[22] Cf. on this below, IV C.

various fragments widely scattered in the sources, which the compiler feels at liberty to paraphrase, abridge, reshuffle, and combine, much more so than he ever does with the canon law texts. This technical skill in composing what one may call *summulae,* and the use of the *Authenticae* point to the Irnerian school; however, for the inscriptions of the several fragments, a style of citation prevails which differs from that current among the Bolognese glossators.[23]

No.	V. No.	Gratian	No.	V. No.	Gratian
1	(1)	D.50 c.45	24	(22)	3 q.11 p.c.3(§1)-p.c.4
2	(2)	—— c.46	25	(23)	4 q.2 & 3 p.c.2-c.3
3	(3)	D.54 c.20	26	(24)	— q.4 p.c.2
4	(4)	1 q.1. cc.126-130	27	(25)	5 q.1 p.c.3
5	(5)	— q.4 p.c.9 (*al.* c.6)	28	(26)	— q.3 p.c.1
6	(6)	— — p.c.12 (§3 *fin.*)	29	(27)	— q.6 p.c.3
7	(7)	— q.7 c.26	30	(28)	6 q.1 cc.22-23
8	(8)	2 q.1 c.14	31	(29)	— q.4 c.7 (*al.* q.5 c.2; *al.* q.4 c.4)
9	(9)	— q.3 p.c.8	32	(30)	10 q.2 cc.1-3
10	(10)	— q.6 c.28	33	(31)	11 q.1 p.c.9
11	(11)	— — c.29	34	(32)	12 q.2 p.c.58-c.60
12	(12)	— — c.30	35	(33)	15 q.1 c.2
13	(13)	— — c.31	36	(34)	— q.3 cc.1-3
14	(14)	— — p.c.39	37	(35)	— — c.4
15	(15)	— — c.41-p.c.41	38	(36)	16 q.1 p.c.40 (*al.* c.40 §§3-4)
16	(*Ap.*p.132)	— q.8 c.2	39	(37)	— q.3 p.c.15-p.c.16
17	(16)	— — p.c.5	40	(—)	17 q.4 p.c.29
18	(17)	3 q.3 p.c.4	41	(38)	19 q.3 c.9
19	(18)	— q.7 p.c.1-c.2	42	(39)	25 q.2 cc.14-15
20	(*Ap.*p.132)	— q.8 c.1 §2	43	(39)	— — p.c.16
21	(19)	— q.9 p.c.15	44	(40)	32 q.1 p.c.10
22	(20)	— — p.c.18	45	(42)	De poen. D.1 cc.6-21
23	(21)	— q.11 c.2	46	(41)	36 q.2 c.3

In pt.I the small number of Roman law texts is striking: 3 from earlier canonical collections, and 3 directly taken from the Roman sources; and of the latter, one is even suspect as an intruded gloss and a second, as coming perhaps from an

[23] V. pp. 29-30.

intermediary collection.[24] At any event, there is no direct quotation where one should expect it most: in his treatise on the sources of law (D.1-15) Gratian relies for his information on *leges* and *constitutiones* entirely on Isidore's Etymologies and canonical collections, without attempting to use the pertinent opening titles of the Digest.[25]

In pt. II one notices a heavy concentration of Roman law texts in the sections dealing with procedure: they account for two thirds (29 out of 43) of all passages. Moreover, of the 14 passages concerned with other branches of the law, 5 may in Vetulani's opinion come from intermediary collections, 3 may be later intrusions or glosses, and 1 cluster of texts belongs to the *tract. de poen.*, the original composition of which, as we know, presents problems of its own.[26] If one accepts these conjectural eliminations,[27] the ratio of procedural to non-procedural texts becomes even more impressive (although it seems somewhat exaggerated to dismiss the latter as "infinitesimal in number," "insignificant" and "of little importance," [28] especially since some of them deal with basic topics such as alienation of ecclesiastical goods [No.32], or *praescriptio* [No.39]).

If Gratian refrains from more abundant quotation of Roman texts on all except procedural topics, this reserve cannot stem from lack of knowledge: witness the workmanlike composition of the passages that do quote Roman sources. But if not lack of competence, there must be another, intentional reason for this attitude: the compiler appears to have con-

[24] V. pp. 31-32; but see below, IV B (No. 1), F (No. 2).

[25] V. p. 33; cf. J. Gaudemet, "La doctrine des sources du droit dans le Décret de Gratien," *Revue de droit canonique* 1 (1951) 5-31, for the material used by Gratian.

[26] V. pp. 33-38 (counting 12 non-procedural passages); the 14 are Nos. 5-7, 32, 35, 38-46, and the suspected ones are Nos. 38, 42, 43, 44, 46, Nos. 5, 6, 35, and No. 45, respectively.

[27] But see below, IV B (No. 35), E (Nos. 42, 43), F (Nos. 44, 46).

[28] V. pp. 34, 38.

ceived of a plan to supplement the ecclesiastical rules on judicial procedure by the pertinent, and technically more advanced, texts and doctrines of Roman law, but to forego, on the whole, major Romanistic borrowings in regard to other topics. The resulting lack of balance in the use of Justinian's texts leads to the obvious question: was this the original scheme of Gratian's work? [29] Vetulani points to the following signs that it was not, and that a revision must have taken place at a late stage of composition:

(*a*) Terminal position: in 14 instances the Roman law fragments are placed together in one cluster at the end of the *quaestio,* often without regard to the line of argument, whereas normally Gratian does not practice—different in this from, e.g., Ivo of Chartres—arrangement by "masses"; [30]

(*b*) Mechanical attachment: in 11 cases the Roman law fragments are tacked onto the preceding canon without interruption, and without fitting always the rubric of that canon; [31]

(*c*) Lack of rubrics: in contrast to Gratian's usual method of introducing a canon, the Roman law fragments are nearly always—there are but 5 exceptions—presented without a rubric of their own; [32]

(*d*) Transcriptional disturbance: in numerous instances the Roman Law passages are found to be of uncertain position in the manuscripts, or absent from some manuscripts; [33]

(*e*) Material and formal inconsistency: there are several instances—and these are perhaps the most interesting cases—of Roman law texts quoted in a wrong context, or adduced by way of afterthought, or leaving even jarring inconsistencies

[29] V. pp. 38-39.

[30] V. p. 40: Nos. 4, 6, 7, 9, 15, 17, 18, 24, 25, 26, 27, 30, 31, 41 of our list.

[31] V. p. 41 (counting 9): Nos. 22, 27, 28, 29, 31, 32, 33, 35, 42; add 4, 16.

[32] V. p. 41 f., counting four exceptions, but see below, IV C.

[33] Discussed in V. *passim*; also *Ap.* 131-3; more below, IV E.

with a preceding or following dictum, inscription, or rubric; [34]

(*f*) Glossators' critique: a Bolognese tradition, which can be traced back to Johannes Faventinus, asserted that the lengthy *summula de praescriptione* in C.16 p.3 p.c.15-p.c.16 (No.39) was not Gratian's own work but had been supplied "ab alio" —perhaps, as the *Glossa Palatina* and the *Glossa ordinaria* have it, but without proof, by the civilian glossator Jacobus.[35]

The cumulative force of the evidence assembled is, I believe, overwhelming in favor of Vetulani's thesis up to this point. We may leave aside his further speculation as to the identity of the "redactor"—here, as in other cases of work that grew by accretion in the original shop, caution seems indicated, and Vetulani himself is not eager, for instance, to give too much credit to Johannes Faventinus' story on the *De praescriptione,* even though it was told by a near-contemporary. As to the main issue, however, while some points of detail may be questioned, the soundness of Vetulani's conclusions appears clearly established by his material and may be corroborated by further observations. But before we turn to such critical and supplemental notes (below, IV), a more exciting question has to be discussed: the traces that exist of at least one manuscript which represents a stage of Gratian's work before the final redaction.

III

The slender pamphlet with the title page reading, "Diomedis Brava/ Patricii Tranensis/ Disquisitio Critica/ de Interpolatione / Gratiani/ Bononiae Apud Haeredes Benatii/ 1694./ Super. permissu," (pp.xxiv), was already in Sarti's

[34] V. pp. 42-47, discussing Nos. 22, 25, 28, 33, 34; cf. also pp. 16, 31 (No. 1), 18 (No. 7); more below, IV H.

[35] *Ap.* 131, quoting from J. Juncker, "Summen und Glossen," ZRG *Kan. Abt.* 14 (1925) 390 n. 1 (but for *Summa Parisiensis*, read *Summa Lipsiensis* in *Ap. cit.*). Johannes Teutonicus' *Glos. ord.* C.16 q.3 p.c.15, v. *non potest* (cited by Juncker, *loc. cit.*) comes verbatim from *Glos. Pal.* (MS Vat. Pal. 658, fol. 59ra).

day a great bibliographical rarity.[36] I have seen a microfilm of the copy owned by the University Library of Pisa.[37] Two eighteenth-century reprints, however, are of easier access: one, in Justus Henning Boehmer's edition of the *Corpus iuris canonici,* with the editor's notes;[38] the other, in Paul Riegger's *Dissertatio de Decreto Gratiani,* with Boehmer's and Riegger's notes.[39]

Behind the pseudonym, Diomede Brava, and the false imprint one of the representative figures of that great age of polyhistors is hiding: Gratian's confrere, the Camaldulese Guido Grandi (1671-1742), who died as professor of Mathematics in Pisa and whose work in the mathematical sciences appears to be better remembered than his numerous writings on topics of history, philosophy, theology, hagiography, etc.,[40] though his share in the discussion of the *littera Pisana* will be recalled by the student of the textual transmission of the Digest.[41] The *Disquisitio* was actually printed in Pisa, in 1730, and Don Guido always stoutly denied having written it;[42] but he adopted a number of "Brava's" arguments on interpolation when—under another pen-name again—he wrote his

[36] M. Sarti et M. Fattorini, *De claris Archigymnasii bononiensis professoribus* (Bologna 1769-72) I 274 = 2nd ed. (Bologna 1888-96) I 346 f.

[37] Shelf-mark A-Y9-58, bound after Guido Grandi's *Epistola de Pandectis* (Florence 1727) and his *Vindiciae pro sua Epistola de Pand.* (Pisa 1728). I wish to thank Dom Anselm Strittmatter, O.S.B., for his kind help in locating this rare copy and having it microfilmed for me.

[38] Halae Magdeburgicae 1747: I pp. xlii-xlviii.

[39] Vindob. 1760 (not seen); reprinted in *Thesaurus iuris ecclesiastici,* ed. Ant. Schmidt, S.J. (Heidelberg 1772) I 129-238: pp. 186-204.

[40] See the brief notice by A. Agostini in *Enciclopedia Italiana* 17.718 and the bibliography listed in L. Ferrari, *Onomasticon* (Milan 1947) 373.

[41] Cf. for instance C. F. von Savigny, *Geschichte des Römischen Rechts im Mittelalter* (2nd ed. Heidelberg 1834-51) III 462 etc. (see Index s.v.); B. Kübler, *Geschichte des Römischen Rechts* (Leipzig 1925) 408 n. 4. See n. 37 *supra,* 43 *infra* for titles.

[42] J. B. Mittarelli et A. Costadoni, *Annales Camaldulenses* VIII (Venice 1764) 622; cf. G. M. Mazzucchelli, *Gli scrittori d'Italia* II. iv (Brescia 1763) 2038.

Nuova Disamina della Storia delle Pandette Pisane.[43] There were not many to follow him.[44] The veil of mystification thrown around himself and his printer unduly discredited Brava in the eyes of Sarti; and Sarti remained, it seems, the only scholar after Boehmer and Riegger seriously to discuss Grandi's interesting observations: the great modern authorities on Gratian do not even mention the *Disquisitio*.

The striking discovery on which "Brava" reported in detail was a manuscript of Gratian's book, identified as "in bibliotheca monasterii S. Blasii apud Vesontionem diu seruatum, nunc in suburbano amici praesulis musaeo positum." He describes it as consisting of 340 folios, and containing neither *paleae* (but see below) nor glosses; above all, he records the absence of many texts never before—and, we may add, except for Vetulani never since—suspected. A comparison shows that of the 46 items of our list only 14 appear to be present in Brava's manuscript (= *Br*): Nos. 2, 3, 11-14, 16, 20, 21, 23, 33, 39, 40, 44. Br omits 30 pieces altogether, while in 2 instances constitutions from the *Codex Theodosianus*, i.e. from the tradition of the Visigothic Breviary, take the place of the usual quotations from Justinian's Code: Nos. 36, 42.[45] In a good many cases Brava supports the external evidence by arguments of internal criticism, scrutinizing the accepted text of Gratian for signs of "interpolation"; the point is nearly always well taken.[46]

[43] Bartolo Luccaberti, *Nuova Disamina* . . . (Faenza 1730); cf. Mittarelli *loc. cit.*; Sarti I 274 and note *d* (2nd ed. 347 and n. 2, where the pseudonym is wrongly given as Lucchetti).

[44] See however J. B. Bartholus (Bartoli), *Institutiones iur. can.* (Ausugii [Borgo di Val Sugana] 1749) 501 f.; cf. Sarti *loc cit.* n. *e* (n. 3).

[45] Cf. below, IV E, IV G (*d*). Brava claims to have seen also in other manuscripts Justinian law replaced by Theodosian law: (No. 4) C. 1 q.1 c.126; CTh. 9.27.6 for CJ. 9.27.4; (29) 5.q.6 p.c.3: CTh. 11.39.10 (Brev. 11.14.5) for CJ. 1.3.8; (30) 6 q.1 cc.22-23: CTh. 9.14.3, 9.35.1 for CJ. 9.8.5, 4; (43) 25 q.2 p.c.16 § 4: CTh. 1.2.6 (Brev. 1.2.4) for CJ. 1.22.4; (45) (46) De poen. D.1 c.6 = 36 q.2 c.3: CTh. 9.25.2 (Brev. 9.20.2) for CJ. 1.3.5. See Brava §§ 31, 52, 53, 75, 81, 84; all these are texts absent from *Br*.

[46] Nos. 1 (see below, IV B), 7 (IV D), 8 (IV C), 19, 25, 28 (IV H), 31 (IV D), 34, 38 (IV H), 46 (IV F).

Sarti (and, to a lesser extent, Boehmer) discounted the evidence of *Br*—since no further corroborating manuscript turned up—by arguing that the scribe of this unique codex must have been an overscrupulous canonist, who on principle eliminated, wherever possible, Gratian's genuine quotations from civil law. But this hypothesis is easily rebutted if we remember, (1) that in the two cases mentioned there is little to commend to an overzealous canonist the Theodosian Code instead of that of Justinian; (2) that by all standards of philological method at least in the cases of formal inconsistency [47] the original absence of the suspect text is more plausible than its later elimination; (3) that *Br* includes nearly all those Roman law texts which Gratian took from intermediary canonical sources: of these 22 texts all but 2 are found in the manuscript, and the two significantly occur in contexts the omission of which in *Br* is borne out by other critical considerations.[48]

The presence in *Br* of most of the second-hand Roman texts disposes not only of the theory of the anti-civilian "editor" of the manuscript, but also of the suspicion—not voiced in so many words by Sarti but still to be considered—that the whole "codex" of Brava might be a hoax, cleverly conceived on the basis of a merely conjectural elimination of certain Roman law texts. While misgivings are understandable, the intrinsic trustworthiness of *Br* cannot be impugned. In this connection, a second look at the texts from Justinian that are present (or at least not reported absent by Brava) is in order.

Of the 14 passages, the following 5 only are beyond suspicion: Nos. 2 (D.50 c.46: CJ. 9.16.5), 3 (D.54 c.20: 5 *Authenticae* of CJ. 1.3.36, 37), 14 (C.2 q.6 p.c.39: CJ. 7.70.1), 21 (3 q.9 p.c.15: *Auth. Si debitum* [49] CJ. 4.20.18), 44 (32 q.1

[47] Below, IV H; above at n. 34.

[48] C.16 q.1 c.40 (bound up with No. 38, see below, IV H) and 19 q.3 c.10 (Epit. Jul. 115 cc.62-63, bound up with No. 41 [cf. V. p. 26 f. No. 38], which is absent from *Br*, see Brava § 69).

[49] *Si enim scriptum sit debitum* (Nov. 90.2-3), cf. Vacarius 4.17 n.5 (ed. F. de Zulueta, Publ. Selden Soc. 44; London 1927, p.126; p.lix No. B 16);

p.c.10: CJ. 9.9.2, 1). The other 9 can be attacked on various grounds and are, in part at least, on Vetulani's list of suspects.[50] Had Brava-Grandi been out to invent a manuscript characterized by the absence of what he considered interpolations, he would at least have eliminated C.3 q.8 c.1 §2; 11 q.1 p.c.9; 16 q.3 p.c.15-p.c. 16 (Nos.20, 33, 39); for they would have been about the most convincing specimens to be had.[51] That he remains silent about these, is perhaps the best indication of his sincerity: as elsewhere, so in the world of manuscripts reality is never as beautifully symmetrical as fiction.

This impression is confirmed if we test *Br* for *paleae*. By no means does the manuscript represent a particularly "pure" text. Instead of an expected low number of *paleae*, over 60 seem to be present; and even if we take into account possible oversight in the case of *paleae* not easily spotted (e.g. those appearing as a portion of text within a given canon),[52] or a slackening of Grandi's interest as the survey went on, there remains a goodly number of cases in which it would have been tempting for him to assert absence of a given piece from his manuscript so as to enhance its age. Yet he himself points to the fact that many texts which *in vulgatis* are marked as *paleae* do appear in *Br*.[53] The manuscript thus

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Vetulani, "Les Novelles de Justinien dans le Décret de Gratien," RHD[4] 16 (1937) 472 f.

[50] V. pp. 21, 46 (Nos. 23, 33 [21, 31]); *Ap.* 130, 132 (Nos. 39, 16, 20); and see below IV A (No. 40), IV B (Nos. 11-13), etc.

[51] No.20 is a gloss slipped into the text of 3 q.8 c.1 (below, IV D: but Grandi might have merely overlooked this case), No.33, a glaring case of inconsistency of inscription caused by incomplete revision (V. p. 46), and No. 39 was suspected even by the early glossators (above, at n. 35; cf. below, IV E).

[52] They are (numbers refer to Friedberg's list of *paleae*, col. xiii ff.) Nos. 2, 6, 7, 11, 53, 77, 106, 121, 148, and C.22 q.4 c.19 § 1 (on this *palea* see Vetulani, ZRG *Kan. Abt.* 22 [n.8 *supra*] 363; Ullmann, *Stud. Grat.* I 198).

[53] Brava § 16: "... nam quandoque capita quaedam quae in vulgatis *paleae* nomine recensentur, hic inserta vidi, suppresso tamen *paleae* vocabulo." In the case, e. g., of several *paleae* following each other immediately in the vulgate text, one would expect total absence or total presence in a given manuscript. Not so in *Br*, where of such pairs or triplets we sometimes find one single

represents indeed a textual tradition of curiously mixed ancestry: on the one hand, a stage earlier than the last original revision; on the other, a text already enlarged by numerous additions to the completed book.

Under these circumstances it is exasperating that Grandi remained so vague about the provenance and location of his source. A *monasterium S. Blasii* does not seem to have existed near Besançon; could one assume that the manuscript came from Sankt Blasien in the Black Forest—where so many celebrated codices now scattered in various libraries originated —and had traveled via Besançon to Italy? And where should one place the *musaeum suburbanum amici praesulis?* Not at Trani in Apulia, to be sure, the home of "the Patrician Brava"; but could it be Florence, or Pisa, where the true author of the *Disquisitio critica* spent his academic years? A scrutiny of the largely unedited correspondence and other papers of Grandi in the University Library of Pisa [54] may or may not lead us onto the trace of the manuscript. If it still exists, it will eventually be reached by the group of researchers now engaged [55] in the project of a *catalogue raisonné* of all the manuscripts of Gratian. But *Br* may be lost, just as another, famous *codex Vesontinus*—the one from which Cujas was able to supply certain portions of the *Sententiae* of Paulus—is lost,[56] and in that case no one will ever answer the riddle of its origin.

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palea present (here indicated by italics): Friedberg's Nos. 4-*5* (Dist. 9 cc.1-*2*), 22-*24* (Dist. 35 cc.5, 6, *7*), *26*-28 (Dist. 38, cc. *13,* 14, 15), 60-*62* (Dist. 88 cc.11, 12, *13*), *142*, *143*, 144 (C. 23 q.8 cc.*1*, *2*, 3).

[54] Agostini, *Enciclop. Ital.* 17.718.

[55] Cf. Mme. Rambaud, "Plan et méthode" (n. 16 *supra*) 211.

[56] Jac. Cuiacius, *Observationes* 21.13 ff.; cf. G. Haenel, *Lex Romana Visigothorum* (Berlin 1849), praef. pp. xvii, lxxxix; P. Krüger, *Collectio librorum iuris anteiust.* II (Berlin 1878) 44; A. Berger, in Pauly-Wissowa, RE 10.732; *id.*, "In tema di derelizione" (1914), *Bullettino dell'Istituto di diritto romano* 32 (1922) 151, with further bibliography in n.1.

IV

The observations that follow here are offered by way of a supplement to Vetulani.

A. *Number of passages from Roman law.* In the article of 1946/7 this was given as 42 units; two more were discussed in *Apollinaris* in 1948 (Nos. 16, 20 of our list); and Vetulani's No. 39 should have been counted as two according to his own principle, since in the manuscripts cc.14-15 and dict. p. c. 16 of C.25 q.2 are two distinct units (Nos. 42, 43 of our list). To be added is the following:

(40) C.17 q.4 p.c.29, on punishment in secular law of various species of sacrilege. Sources: (pr.:) CJ. 1.3.10, paraphrased (". . . sicut in primo libro Codicis legitur titulo de episcopis et clericis et lege Si quis in hoc genus sacrilegii proruperit") and with the addition of a garbled reference, " et in Digestis tit. ad legem Juliam pecuniarum repetundarum, l. ultima"; (§1:) CJ. 9.29.1-3, paraphrased (". . . lib.ix. Codicis tit. de crimine sacrilegii").—The first part of the dictum duplicates a quotation found as early as Gregory the Great's famous *commonitorium* to the *defensor* Johannes (JE 1912: *ep.* 13.50 in MGH *Epp.* 2.415 lin.10-18), cf. C.2 q.1 c.7 §7; but, as the form of reference shows, neither this text nor Anselm of Lucca 4.23 (ed. Thaner, Innsbruck 1906-15, p. 201) [57] were Gratian's source. The form of reference in both paraphrases from the Code is in keeping with a style found elsewhere in Gratian (see below, B) but the reference to the Digest is given in the " Irnerian " style, i.e. by citing only rubric and *lex.*

The glossators had no difficulty observing that the reference was wrong.[58] Dig.48.11.9 (*de lege Julia repetundarum l.*

[57] Gregory the Great cites " Cod. lib. primo tit. tertio const. undecima, Imperatores Archadius et Honorius Augusti Theodoro p. p."; Anselm of Lucca omits all reference to the Code, giving only the inscription (*Imperatores* etc.). The text occurs also in *Coll. Caesaraugustana* (cf. Savigny, *Geschichte* II 491) but no details are known.

[58] *Glossa Palatina ad loc.*: " Hic falsum dicit, quia hoc non dicitur in illo tit. ff. ad leg. iul. repe. set in illo tit. ff. ad leg. iul. peculatus, sacrilegii (7, *al.* 6)

ult.) makes no sense whatever in the context, but the nearby Dig. 48.13.7(6) does; this is *ad legem Juliam peculatus l. Sacrilegii* (not the last of the title), which treats of punishments for various forms of sacrilege. A rubric as cited by Gratian does not even exist;[59] the wording "*ad* l. Jul. *pecu*niarum repetundarum" points to original contamination, and a misreading or dittography of some abbreviation for "pe*culat*us" (such as *pecul't'*) might account for the otherwise incomprehensible "l. ult." (which in turn would have led to the dropping of the initial word, *Sacrilegii,* of the *lex* actually meant). Such heavy textual disturbance indicates intrusion of a marginal note in the final stage of redaction. If such a note began with "et repetas" or the like, this could be one way of explaining the strange aberration to the Julian law on *repetundae*:

> et repetas in Dig. tit. ad l. Jul. pecul't'. Sacrilegii
> et in Dig. tit. ad l. Jul. pec. repet. l. ult.

Another explanation could be offered by the fact that the first mistake ("ad l. Jul. pecul't'. l. ult.") led to a text (fr.16, *al.* 14) in which "publica iudicia peculatus et de residuis et repetundarum" are jointly named.

B. *Critical value of inscriptions.* The foregoing may be added to the cases, discussed by Vetulani, in which Irnerian style of reference can be taken as a sign of late intrusion. This much, however, should be clear: (*a*) If Gratian, as a rule, does use a different style for the inscriptions he gives the texts from Justinian's law, this does not mean that he "n'a pas subi—au moins dans cette direction—l'influence de l'Ecole de Bologne" (V. p.31), but is to be explained by the fact that the brief Irnerian style (rubric of title and initium of *lex*), while sufficient in glosses and references for identify-

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ct l. sacrilegii capite (11, *al.* 9). Errauit ergo in titulo, et utinam in hoc solo errasset" (MS Pal. 658, fol. 61rb); *Glos. ord. ad loc.*: "Magister errauit in nomine huius tituli. . ."

[59] Hence the Roman edition omits the word "pecuniarum," but cf. Friedberg n. 293 *ad loc.* for the MSS.

ing a passage, is not *per se* a satisfactory way of introducing a passage quoted in a collection of *auctoritates;* (*b*) In the early generations of Irnerius' school, so uniform a style of reference as postulated by Savigny did not exist; [60] (*c*) Variety of style is found also in Gratian's inscriptions to a larger extent than Vetulani admits; e.g., in inscriptions of constitutions from CJ. the name of the issuing emperor is often but not always given.[61]

Suspicion against texts introduced in the Irnerian style is borne out by other signs of disturbance in the following cases:

(1) D.50 c.45: material inconsistency, variations of inscription, cf. V. pp. 16, 31 n.3; Brava §19.

(5) 1 q.4 p.c.9 (*al.* c.6): missing in some MSS, designated as *palea* in others, variations of position, cf. V. pp. 17, 36.

(6) 1 q.4 p.c.12 §3 *fin.*: reference to CJ. 8.4.7, which in the vulgate MSS follows as *palea*, cf. V. pp.18, 34, 36; the entire sentence, "Nam si putat" *rell.* is lacking in many MSS, cf. Friedberg n. 133 *ad loc.*[62]

(19) 3 q.7 p.c.1-c.2: formal inconsistency of dict. p.c.2, see below, H.

(22) 3 q.9 p.c.18: modifying but inconsequential afterthought, missing in one of Friedberg's MSS, cf. V. pp. 41, 45; reported as marginal gloss in another MS by Brava §46.

(35) 15 q.1 c.2: variations of position, cf. V. pp.25, 37.

(40) 17 q.4 p.c.29: contamination, see above, A.

(45) De poen. D.1 cc.6-21: variations of position, insufficient coordination of c.22 and dict p.c.22, cf. Brava §81; Rambaud, "Plan et méthode" (n. 16 *supra*) p. 222.

Except for No. 40, they all are absent from Brava's manuscript; Nos.5 and 6 should probably be classed as *paleae.* In the other cases, however, one would hesitate to say with

[60] M. Conrat, *Die Epitome exactis regibus* (Berlin 1884) lxviii ff., cexxxvi ff.; H. Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge 1938) 165 f., 196 f.

[61] Cf. Nos. 17, 18, 22-24, 29 of Vetulani's (Nos. 18, 19, 24-26, 31 of our) list, and No. 40 (above, A).

[62] Cf. M. Boulet-Sautel, "Les 'Paleae' empruntées au Droit romain . . . ," *Studia Gratiana* I 153 for MSS in France.

Vetulani that "il s'agit ici, à coup sûr, d'intercalations postérieures dues aux décrétistes" (V. p.30). While it is very likely for these texts to have originated in marginal notes—hence the Irnerian form of reference instead of inscriptions proper—there is no reason why the transference from margin to text could not have taken place during some stage of original revision. The disturbances are no greater in these than in many other texts from Roman law that have the "right" kind of inscription. Also the fact that many of these passages were glossed unsuspectingly by the earliest decretists would seem to corroborate our explanation.

(11, 12, 13) Of the series C.2 q.6 cc.29-31, not criticized in this context by Vetulani, the first (c.29) is inscribed in Friedberg's best manuscripts: "Digest. tit. Quando appellandum sit, lege I." (Dig.49.4.1); the subsequent chapters have no inscriptions but instead the rubrics, c.30: "De appellationibus recipiendis uel non," c.31 pr.: "De libellis dimissoriis," c.31 §1 (separate chapter in the oldest MSS): "Titulo Nichil nouari," which are actually verbatim the rubrics of the respective titles of the Digest (Dig. 49.5, 6, 7) [63] from which Gratian's texts were taken—that is, they are not rubrics proper, i.e., summarizing statements of Gratian's own making, but "Irnerian" references turned into "rubrics." If we notice further that cc.29-31 are a consecutive series of excerpts from Digest 49.4-7, their origin from a marginal notation seems obvious. Other traces of this may be found: in c.30 some MSS offer readings closer to the Digest than to Gratian's text; [64] some glosses have crept into the text of c.29; [65] posi-

[63] The title of 49.7 *Nihil innovari* (al. *novari*) *appellatione interposita* is shortened by haplography, since c.31 §1 (Dig.49.7.1) begins, "Appellatione interposita . . ."

[64] Gratian's text (pr.), ". . . sed et si mater ex pietate prouocauerit, dicendum est," cuts short the emendations attempted by the vulgate MSS of the Digest in the corrupt passage Dig. 49.5.1.1 (for which see Mommsen's apparatus *ad loc.*); the readings of Friedberg's MSS *EGH* (n.353), *CEG* (n.356) follow in a garbled fashion the Digest vulgate. Also, some MSS supply Dig. 49.5.3 (Gratian's c.30 has: 49.5.1, 2, 4), before or after c.30 §2 (fr.4), see Friedb. n.363 (*EH, C*).

[65] Cf. *Notae Correctorum* c.29; *Summa Parisiensis, ad loc.* v. *cum quis*: "hoc est glossa" (p.110 ed. McLaughlin).

tional uncertainty is evinced by the Cracow MS, where the entire series cc.29-31 is repeated after c.41.[66] Finally, some MSS have a rubric (preceding the inscription) for c.29: "Forma uero appellationis hec est,"[67] which makes no sense in this place, as c.29 treats of *tempus*, not of *forma appellationis*. It can be only explained by contamination with the first sentence of dict. p.c.31 ("Forma apostolorum[68] hec est. . ."), and this must have occurred in the archetype when cc.29-31 were still in the marginal stage and the words in question followed immediately upon c. 28.

Yet in *Br* the three chapters are not only present but even provided with inscriptions in the "correct" Gratian style instead of the title rubrics,[69] and the same is found in some of Friedberg's MSS.[70] The verdict, then, again must be: original revision, not interpolation.

C. *Critical value of rubrics.* Vetulani notes the extremely rare occurrence of rubrics for the texts quoted directly from Justinian; of the four cases he cites (Nos. 8, 10, 12, 13), two have just been discussed and should be eliminated as being merely miscarried inscriptions. Instead, No. 37 should be added. Vetulani considers at least one of the texts in question (No.10) as taken from an intermediary canonical collection, not from the Roman source directly, and hence, he believes, it is possible that the others too may turn out to belong to that category (V. pp.19, 42). The argument, not

[66] *Ap.* 132 f.

[67] Friedberg, n. 283 *ad loc.* (The rubric given in the Roman edition is of later making).

[68] appellationum *AD*, appellationis *B*: Friedb. n.385 *ad loc.*

[69] Brava §40: "Rursus in rubrica praecedente c. *Biduum* 29 eiusdem quaestionis, citatur immediate *Vlpianus lib.1 de appellationibus*: quemadmodum et in alia rubrica ante cap. *Non solent*.30. idem *Vlpianus lib.29. ad edictum* laudatur, vti et *Scaevolae*, *Martiani* [=c.31], et *Macri* [Boehmer, Riegger: *Marci*, but Macer is meant] testimonia ex eorum libris infra citantur, necnon *Vlpiani lib.4. de appell.* absque mentione tituli digestorum."

[70] Cf. his nn. 349, 359, 361 (c.30), 365, 376 (c.31).

compelling in itself, fails with regard to the two texts that came from a series of marginal references (Nos. 12, 13, discussed above); it can be disproved for the others as well.

(10) C.2 q.6 c.28 is Gratian's only quotation of a Novel from the *Authenticum* (Nov.23: Auth.4.2), a unique departure from his regular practice to quote from the *Authenticae* of the Code. Therefore Vetulani in an earlier article had postulated a hypothetical, intermediary collection as source;[71] in the article of 1946/7 the hypothesis is treated more or less as an established fact.[72] But the absence from *Br* of the chapter and of the preceding dictum indicates on the contrary the introduction of this text in a late stage of revision (later, perhaps, than the series cc.29-31 from the Digest?), and it cannot be overlooked that the chapters now stand in a substantially wrong order: for the dictum and Nov.23, in which (to use Gratian's words) "Justinianus in constitutionibus suis corrigens, infra decem dies appellationis remedium cuique dandum decreuit," should logically have followed rather than preceded the text from the Digest, which supposes a *biduum vel triduum*. The whole juxtaposition remains clumsy; in Gratian's workshop two sets of marginal notes may have been made, one from the Digest and one from the *Authenticum*, to modify the abstracts from the *Theodosianae leges* (i.e. from the *Sententiae* of Paulus with the Visigothic *interpretatio*) which Gratian here in cc.22, 24-27 had taken over from Ivo, *Panormia* 4.127-131.[73]

(8) C.2 q.1 c.14 (Dig.48.2.8-11, 13) with the rubric "Qui ab accusatione prohibeantur et qui recipiantur" is placed at the end of the affirmative part of q.1 (V.p.18); in the Cracow MS it has been supplied in the margin without rubric (*Ap.* p.131),

[71] "Les Novelles . . ." (n.49 *supra*) 476 f.

[72] V. pp. 19, 42.

[73] On Ivo as Gratian's source for these texts see *Summa Parisiensis*, C. 2 q.6 c.25 (p.109 McLaughlin), a passage of great interest for the history of the transmission of the Theodosian Code; cf. *inter al.* Mommsen, *Proleg. Theod.* (Berlin 1905) pp. lxxviii, cv.

and it is absent from *Br.* The chapter does not properly fit its place, as was justly observed by Grandi (Brava §35), for C.2 q.1 deals with the observance of *ordo iudiciarius* (cf. dict. pr. and p.c.14), not with the question of capacity of accusation, which is considered *ex professo* under various aspects in C.2 q.7; 3 qq.4, 5; 4 qq.1-5; 6 q.1; 15 q.3. All this suggests late insertion.[74]

(37) C.15 q.3 c.4 (CJ. 1.3.30.5) with the rubric "Lese maiestatis et publicorum iudiciorum et symonie accusatio equaliter proponatur" (not discussed by Vetulani) is absent from *Br.* The text from the Code serves Gratian's argument (equal right of accusation in cases of simony and lèse majesté) only by a *tour de force*, since it treats chiefly of the equality of punishment. Gratian's unusual interpretation would explain why he found it necessary to underscore his point by a special rubric. Significantly the same text with the same interpretation is referred to in the dictum p.c.22 of C.6 q.1 (No.30), where the traces of late insertion are quite obvious (see below, E).

D. *Revision or interpolation?* In addition to some texts already discussed (above, B), the following have been suspected as being inserted by the schools after Gratian, i.e., equal to *paleae*:

(16) C.2 q.8 c.2 (CJ.4.19.25) is found as only a marginal entry in some of the oldest and best MSS (*Ap.*p.132), yet seems to be present in *Br.*[75]

(20) C.3 q.8 c.1 §2: the brief quotation from CJ. 7.45.14 interrupts the canonical text of Ps.-Zephyrinus and is obviously intruded from the margin; it has a very irregular tradition in the MSS and was criticized early by the glossators.[76]

[74] Boehmer's note 41 on Brava *ad loc.* erroneously asserts that the text came from the *Panormia.*

[75] Also Ullmann, *art. cit.* (n.8 *supra*) 177 remains in doubt.

[76] *Ap.* p.132; cf. *Not. Corr. ad loc.* (v. *ut codice*); Friedberg n.7; Ullmann p. 180 f. (where a critical gloss by Simon of Southwell is quoted); *Summa Paris. ad loc.* (p. 122 ed. McLaughlin, cf. p.xiii).

But Friedberg's best MSS have the text and Brava remains silent (or did he overlook the matter because it concerns a passage in the middle of a canon?).

(31) C.6 q.4 c.7 *fin.* (*al.* c.4 *fin.*, *al.* q.5 c.2) shows uncertainty of position even in the best MSS (V.p.23, *Ap.*p.132); it is absent from *Br* and others. Suspicions voiced by earlier writers are borne out by the designation as *palea* in several MSS studied by Mme. Boulet-Sautel.[77]

Two of these three cases show the difficulty of finding a sharply defined demarcation line between interpolation and original revision. But there are also some instances in which we find the two stages side by side. Nos.4, 7, 18, 25, 32 of our list are present in all manuscripts but not in *Br.* and must be considered late original insertions. They attracted further additions in the schools as follows:

(4) 1 q.1 cc.126-130: in some MSS c.127 is enlarged by CJ. 9.27.2, 3 (to be added to Friedberg's list of *paleae*).[78]

(7) 1 q.7 c.26: *palea* c.27 follows, and according to *Summa Parisiensis* a further *palea,* CJ. 1.3.30, was read here by some.[79]

(18) 3 q.3 p.c.4: *palea* c.4 precedes and *palea* p.c.4 §7 follows.

(25) 4 q.2 & 3 p.c.2-c.3 (see below, H): *palea* c.2 precedes.

(32) 10 q.2 cc.1-3 (see below, E): first portion of c.3 is *palea.*

To these may be added Gratian's Romanizing dictum in C.1 q.4 p.c.12 §§2-3, to which the reference No.6 (§3 *fin.*: probably *palea,* see above, B) and *palea* c.13 are attached; §§2-3 are not found in *Br.* (see below, G).

E. *Transcriptional disturbances.* Uncertainty in the position of the Roman texts, or omission in some manuscripts,

[77] *Art. cit.* (n.62 *supra*) 151 f. For the Cambridge MSS, see Ullmann 176 f.; for MSS used by different glossators, e.g., Singer, *Rufinus* p.249 note *b*; McLaughlin, *Sum. Paris.* p.xiv.

[78] Cf. Boulet-Sautel p.152; Friedberg *ad* c.128, n.1793.

[79] Ed. McLaughlin p.100; cf. p.xii. (The passage stands in need of emendation.)

with or without later correction, was reported by Vetulani in various cases, some of which have been examined above.[80] The following observations may be added to illustrate two symptoms of revision, not discussed by Vetulani, which we may characterize as "internal duplication" and "split-and-shift."

(26) C.4 q.4 dict. p.c.2, originally attached without interruption to c.2 (Ps.-Damasus, JK †243 c.15 *fin.*-c.16 *med.*: ed. Hinschius p.504), is absent from *Br.* In the vulgate MSS, c.2 §1 "Inscriptio semper fiat—dampnari,[81] cum et seculi leges hec eadem retineant," is followed by:

(*a*) three vague references to the Code, "Codice libro ix. titulo de accusationibus, Codice libro ix. de adulteriis, titulo de abigeis et inscriptionibus" (Friedberg n.27 relegates the last two words in the apparatus) = CJ. 9.2, 9.9, 9.37;

(*b*) Gratian's own words, "Aliquando etiam sine inscriptione accusatio fieri potest" (dict.§1);

(*c*) abstracts and paraphrases from the titles referred to in *a*, without any inscriptions and separated only by "item": CJ.9.2.7, first sentence[82] (dict.§1 *fin.*); 9.9.6 paraphr. (§2); 9.37 un. (§3); 9.2.8 (§4); 9.2.16, first sent. (without "item": §5).

A number of MSS repeat here c.2 §1 "Inscriptio—retineant," but some of the best MSS have it *only* here,[83] thus clearly indicating that the cluster of Roman law texts was in a first stage of composition inserted—most probably by expanding a marginal note—between the two sections of the Pseudo-Damasus and gradually shifted to the end of the canon. (After the last quotation from the Code, the vulgate

[80] E.g., Nos. 5, 11-13 (above, B), 8 (C), 16, 20, 31 (D).

[81] Source: CTh. 9.1.11 *Interpr.*

[82] More in one of Boehmer's MSS (cf. his n. 46 *ad loc.*).

[83] Cf. *Nota Corr.*; Friedberg n.18 *ad* c.2. Also in the text used by the *Summa Parisiensis*, cf. *ad loc.*: "Leges vero hic appositas [oppositas MS] sic lege ut *ultimam* ponas tamquam pro rubrica, hoc modo: 'Inscriptio vero semper fiat,' etc. . . ." (p. 127 ed. McLaughlin, italics mine).

text concludes with another sentence of Gratian's, " De domo etiam—incidat iudex," and c.3, from Nicholas I, JE 2796—both, however, are missing here and transferred to the end of q.6 in some of the oldest MSS.) [84] Even apart from these positional variations the awkward make-up of the passage is telling. The series of references at the beginning—obviously the original nucleus of the dictum—should have been distributed and prefixed by way of inscriptions to the several texts in dict.§§1-5. As it stands now, it leaves the impression of unfinished, untidy work, and the nonsensical reading " de accusationibus. . . de abigeis et inscriptionibus " at the beginning, which is even in the best MSS, suggests that possibly a first, correct reference " Cod. lib.ix tit. de accusationibus et inscriptionibus " was subsequently split by the additional references to the titles *de adult.* and *de abigeis.*

Early copyists made things worse by prefixing the particle *ut* to the initial references, thus making the words " ut Codice. . ." appear as though they were meant to corroborate the preceding c.2 §1 (". . . quia ante inscriptionem nemo debet iudicari uel dampnari " etc.) while on the contrary they introduce the exceptions (*accusatio sine inscriptione*) to this rule. Yet this became the common Bolognese reading; [85] hence the lame explanation in the *Glossa ordinaria*: " istud *ut* respicit uerba sequentia."

(30) C.6 q.1 cc.22-23. For the sources of this *summula* on accusation for lèse majesté, originally part of the dictum p.c.21, see V.p.23. In *Br.* the whole series, with Gratian's introductory observation, " Hec licet ratione. . ." (dict.p.c.21 §1), is missing. Within this *summula* one passage (p.c.22) shows marks of having been split by an interpolated reference; it reads in Friedberg's edition (italics mine):

[84] Friedberg n. 40 *ad* dict.p.c.2; cf. also Rambaud, " Plan et méthode . . ." (n. 16 *supra*) 220 for MS Paris 3888.

[85] *Ed. Rom.*; Friedberg's MS *D* (n.22); cf. also the *casus* of Bartholomaeus Brixiensis v. *Inscriptio,* where the difficulties felt by Huguccio and Benencasa (" Beneuen." *ed.Rom.*) are reported.

> Porro symonie accusatio ad instar lese maiestatis *procedere debet*, sicut Leo inperator in I. libro Codicis decreuisse legitur, tit. de episcopis et clericis, l. Si quenquam *procedere debet*. Quod de accusatione, non de pena intellegi oportet.

The *lex* referred to is CJ. 1.3.30, the pertinent part of which (§5 . . . *Sane quisquis hanc sanctam*) Gratian quotes in 15 q.3 c.4, proposing the same interpretation (No.37, see above, C).[86] The constitution does of course not begin "Si quenquam procedere debet," but nearly all of Friedberg's MSS have this dittographic nonsense (so does one early 13th-cent. MS in the Library of Congress),[87] whereas the vulgate text (= *ed.Rom.*) tacitly corrects the passage by suppressing the second "procedere debet." At least one other MS of the 13th cent. replaces the reference by quoting the fragment itself ("Quisquis igitur sanctam—retrahatur").[88] The key to the correct reading is found in the Cologne MSS, which Friedberg should have followed instead of merely reporting on them (nn.281, 282 *ad loc*):

> Porro symonie accusatio ad instar lese maiestatis—sicut Leo imp. in I. lib. Cod. decreuisse legitur, tit. de epis. et cler. l. Si quenquam uel in hac urbe[89]—procedere debet. Quod. . .

(32) C.10 q.2 p.c.1-c.3, originally part of c.1: an important *summula* on alienation of ecclesiastical goods, made up from fragments of CJ.1.2.21 and 1.2.14, with a number of traditional *Authenticae*.[90] Here we have again positional uncer-

[86] The full text was read by some as *palea* at the end of 1 q.7, see at n.79 *supra*.

[87] Law Library of Congress MS G.71 (from Weissenau) fol.98 va.

[88] *Ibid.* MS 67, fol.144va-b; formerly Phillips MS 14953, the whereabouts and contents of which were given as uncertain in my *Repertorium der Kanonistik* (Città del Vaticano 1937) 320. The MS was acquired in 1948 from Christensen, Bloomfield, N. J.

[89] This is the correct initium of CJ. 1.3.30.

[90] For the sources in detail see V.p. 24; but add *Auth. Perpetua quoque* and *Qui rem huiusmodi* (c.2 §§6-7). The sentence "Sed melius dictur . . ." (§10), which V. attributes to Gratian, is part of the *Auth. Qui res iam dictas* (§9) as formulated by Irnerius; cf. *Glos. ord. ad loc.* v. *Sed melius*.

tainty, causing a split of the original canon to which these Roman texts were attached: in the vulgate tradition the canon (c.7 of the Council of Agde) begins as c.1 "Casellas—presumant" and continues in c.3, after the Roman texts (CJ. 1.2.14.9-10,[91] *Auth. Hec usus, Auth. Quibuscumque*: c.3 pr.-§2), with the words "Quodsi necessitas—permittimus" (§2 *fin.*-§3). But already the *Correctores* noted that "in aliquot melioribus codd." the two sections of the canon are given together as c.1 and that it was thus read by the author of the *casus* on c.1. So also two of Boehmer's, and several of the MSS employed by Friedberg, who consequently prints it that way (though his account of the MSS in the apparatus remains somewhat confused).[92] Yet the splitting of the *canon Agathensis* is the only arrangement that yields a point of contact for the series of Roman texts: they begin after c.1 with a brief clause, "excepta uidelicet causa captiuitatis," quoted from CJ. 1.2.21;[93] and the exception here stated to the prohibition of alienation—viz. redeeming of prisoners, later on amply documented in 12 q.2 cc.13-16, 70, etc.—becomes incomprehensible if it is read after the permissive (c.1 *fin.* Friedberg ". . . in usum prestare permittimus" = c.3 vulg.) instead of the prohibitive part of the canon (". . . neque . . . alienare presumant" c.1 vulg.). In *Br.* cc.2-3 are omitted, but Brava remains silent as regards the short dictum p.c.1, although its origin in a marginal note seems obvious.

(39) C.16 q.3 p.c.15-p.c.16: the celebrated *summula de praescriptione,* which an early Bolognese tradition—or gossip?—declared to be interpolated by someone else,[94] but which is

[91] The preceding portion of §9 is a *palea.*

[92] Friedberg n.9 *ad loc.* seems to imply that *ABC*—his oldest MSS—offer the vulgate position. So does MS Paris 3888, cf. Rambaud, *art. cit.* 220.

[93] According to V.p.24 this fragment is found before Gratian, in Anselm of Lucca 4.22 and in *Polyc.* But the excerpt from CJ. 1.2.21 in Anselm (pr.-§1 v. ". . . in factum actionem") stops short before the passage employed by Gratian. The *Polycarpus* is not accessible to me.

[94] Cf. at n.35 *supra.*

found in all manuscripts, including *Br.* Commenting on p.c.15, dict.pr.,

> Huius ergo longi temporis prescriptio auctoritate Gelasii et secularium legum ecclesiis obici non potest,

i.e. before the beginning of the Romanistic distinction (dict. §1) "Prescriptionum alie," the glossators advised to continue reading farther down, after the end of the long *summula* (p.c.16 §4 *Auth. Quas actiones*), at the words,

> sed sola prescriptio xxx. annorum et deinceps, a qua tamen prescriptione priuilegia Romane ecclesie sunt exclusa *rell.*,

with the subsequent c. *Nemo* (17), thus implying that here Gratian's original text had been split. The *Correctores Romani* observed that one of their MSS repeats after *Auth. Quas actiones* the passage, "Huius ergo—non potest," thus reconnecting by duplication the end of the dictum with its beginning; Friedberg lists three such MSS.[95] The uncertainty of the reading, "sed sola prescriptio" (which fits the end of dict.pr.) or "sed sola prescriptione"[96] (which fits the end of *Quas actiones*), points in the same direction. Multiple recension is further suggested by two internal duplications:[97] p.c.15 §6 briefly cites *Quas actiones* and the initial words of *Epit. Jul.* 119.6; the first of these reappears in a longer excerpt at the end of the *summula,* p.c.16 §4, and the other—which comes from an intermediary collection, *Polycarpus* 3.12.34—reappears paraphrased in full as q.4 c.3 of the same *Causa.*

(42, 43) C.25 q.2 cc.14-15, p.c.16: a *summula* on rescripts, divided by c.16 (Pelagius I: JK 1033) and made up of fragments from CJ. 1.19, 1.22, and 1.23, some of which are found

[95] *Not. Corr. ad loc.* §4, v. *habentibus*, with Friedberg's notes in brackets.

[96] *Ibid.* and Friedb. n. 251.

[97] Cf. *Glos. Pal.* (n. 35 *supra*) and *Glos. ord.* p.c.15 v. *non potest*: "... quod etiam conicitur [conuincitur *ed. Rom.*] ex eo quod ille concordantie bis ponuntur."

also in collections prior to Gratian (V. pp.35, 37; however, no material for collations is available). The whole cluster of texts, including the decretal of Pelagius, is not in its usual place in several of the oldest MSS,[98] and in Friedberg's best MSS the rubric of c.16 is missing.[99] All this points to origin in a marginal notation on c.13, a fragment from Gregory the Great's *ep.* 9.197 (JE 1724), which expressly refers to *imperialis constitutio* for the maxim, " ut ea que contra leges fiunt non solum inutilia sed etiam pro infectis habenda sint " (actually quoted from CJ. 1.14.5.1). Among the parallel texts, cc.14-16, suggested to Gratian by this maxim, Pelagius' decretal JK 1033 is itself a summary of what " clementissimus princeps generalibus legibus constituit," and thus in turn prompted the compilation of the Roman fragments p.c.16.[100] In *Br.* this latter *summula* is lacking, and instead of c.14 (CJ. 1.19.3) Constantine's *Contra ius rescripta* (CTh. 1.2.2 [Brev. 1.2.1]) is read.

F. *Intermediary sources?* For a number of texts Vetulani contemplates the possibility of Gratian's having taken them, at least in part, from earlier canonical collections rather than directly from the Roman sources. Some of these have been disposed of above; [101] one will be considered in connection with formal signs of double recension (below, H: No.38); there remain Nos. 2, 44, 46.

[98] *Ap.* 132 (MSS of Cracow and Plock); Rambaud, *art.cit.* 221 (Paris 3888); Friedberg n.85 *ad* c.12 (MSS *EG*).

[99] Friedberg n.98 *ad* c.16.

[100] CJ. 1.22.2-6 and 1.23.3, 4, 7. It is worth noting that modern authorities who discuss the imperial constitutions Pope Pelagius had in mind cite no other texts than those quoted here by Gratian: see M. Conrat, *Geschichte der Quellen und Literatur des Römischen Rechts im früheren Mittelalter* (Leipzig 1891) 6 n.5, Nos.4-5 (also the fragment left by Conrat of a second edition, which H. Kantorowicz published in ZRG *Rom. Abt.* 34 [1913] 29 n.1, No. 5); V. Wolf von Glanvell, *Die Kanonessammlung des Kardinals Deusdedit* (Paderborn 1905) 444 n. 7 on Deusd. 4.99 (JK 1033).

[101] Nos. 8, 10, 12, 13: above, IV C; Nos. 42, 43: IV E.

(2) D.50 c.46: the mere fact that this piece from CJ. 9.16.5 occurs also in the *Collatio legum Mosaicarum et Romanarum* (V. p.32) does not suffice to support the suggestion of a possible canonical intermediary, especially since Gratian's readings are those of Justinian's Code.

(44) C.32 q.1 p.c. 10: CJ.9.9.2, 1;

(46) C.36 q.2 c.3: CJ. 1.3.5; absent from *Br.* Even if part of these texts can also be found before Gratian (V. pp. 27-28, 35, 37), no conclusion is justified unless we have a connection positively established by textual comparison. Friedberg's apparatus offers no material, and the collation of the first part of No.44 (CJ.9.9.2) with the printed text of Ivo, *Decr.* 8.266 remains inconclusive.[102] In any event, an *argumentum e continuo* for the rest of the dictum is hardly admissible.

G. *Implied proficiency in Roman law.* For this aspect of Gratian's work, which was not discussed by Vetulani, only a few examples will be given in the present paper.

(*a*) D.5 pr., on Natural law: ". . . cepit enim ab exordio rationalis creature, nec uariatur tempore sed immutabile permanet"; D.6 p.c.3 §1: "Naturale ergo ius ab exordio rationalis creature incipiens, ut supra dictum est, manet immobile." Gaudemet, in his excellent analysis of the opening sections of the Decretum, finds here a Ciceronian influence,[103] but the glossators were nearer the truth when they noted[104] such parallels as Inst.Just. 2.1.11 (". . . a vetustiore iure incipere: . . . vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodiit. . ."); Dig. 41.1.1. pr. (". . . et quia antiquius ius gentium cum ipso genere humano proditum est. . ."); Inst. 1.2.11 ("Sed naturalia iura. . . semper firma

[102] The wrong assumption (V. p.27) that this fragment occurs also in the *Coll. Caesaraugustana* is based on the poorly aligned tables in A. Theiner's *Disquisitiones criticae* (Rome 1836) 265; cf. instead, Savigny, *Geschichte* II, 491 and 514.

[103] Gaudemet, *art. cit.* (n. 25 *supra*) 25 n.2, referring to *De republ.* 3.22.33 ("lex diffusa in omnes").

[104] Cf. *Glos. ord.* D.1 pr. v. *Humanum genus*, D.5 pr. v. *Haec quae*, etc.

atque immutabilia permanent. . .''). Gratian's definition may of course be based on an intermediary source, especially since no direct use by him of the Institutes is otherwise known. Still, it is skilfully composed and in its marked Roman character cuts sharply across Gratian's original definition, D.1, pr., which equates *ius naturale* with the divine law "quod in lege et euangelio continetur" (also D.5 pr. after "immutabile permanet": "Sed cum naturale ius lege et euangelio supra dicatur esse comprehensum. . ."). This juxtaposition of concepts was to create certain difficulties of interpretation for the early decretists.[105]

(*b*) D.34 p.c.3: Gratian's definition of concubine,

> Concubina autem hic ea intelligitur que cessantibus legalibus instrumentis unita est et coniugali affectu asciscitur; hanc coniugem facit affectus, concubinam uero lex nominat,

contains civilian terms not derived from the canons he quotes (cc.4, 5) but from the *Auth. Licet* of CJ. 5.27.8 (". . . concubina. . . quae sola fuerat ei indubitato affectu coniuncta," *ex* Nov. 89.12.4) and CJ. 5.27.10 (". . . minime dotalibus instrumentis compositis, postea autem ex eadem adfectione etiam ad nuptialia pervenerit instrumenta. . ."),[106] quite possibly by way of one of the collections of legal definitions current at the time.[107] Gratian's speaking of *legalia instrumenta* instead of *dotalia* or *nuptialia instrumenta* indicates, however, that he had not fully grasped the precise technical meaning. The dictum shows further marks of incomplete revision in that the beginning, ". . . *hic* ea intelligitur" has no point of refer-

[105] Some tentative remarks in the present writer's paper, "Natural Law and Canon Law," *University of Notre Dame Natural Law Institute Proceedings* 3 (1949) 99 f.; cf. O. Lottin, *Le droit naturel chez St. Thomas d'Aquin et ses prédécesseurs* (2nd ed. Bruges 1931) 12; G. Le Bras, "Les écritures dans le Décret de Gratien," ZRG *Kan. Abt.* 27 (1938) 56 f.

[106] Nov. 18.5 (Epit. Jul. 118) adduced in the *Nota Corr.* is much less likely and has no verbal parallels.

[107] "That floating mass of legal glossaries"—Kantorowicz, *Studies* (n. 60 *supra*) 18, with bibliography in nn.7, 8.

ence in the immediately preceding canon D.34 c.1 (cc.2-3 are *paleae*); hence the glossators referred *hic* back to D. 33.[108] This saves the meaning but certainly does violence to the words, for Gratian always uses "illud Gregorii" or similar expressions when he wants to point back to an earlier text. The solution seems to be given in *Br.*, where between D.34 c.1 and dict.p.c.1 Brava read a canon, "Ex concilio Bituricensi: Presbyteri et diacones et subdiaconi, sicut lex canonum praecipit, neque uxores neque concubinas habeant,"[109] which must have disappeared during the process of revision.

(*c*) C.1 q.4 p.c.12: In Gratian's important distinction of *ignorantia facti* and *iuris*, the subdivisions of *ignorantia facti* are based on theological criteria and illustrated by biblical examples;[110] the discussion of *ignorantia iuris*, however, subdivided into *ign. iuris naturalis* and *iuris civilis*, is entirely built upon civilian conceptions, but without direct quotation (leaving aside the dubious last sentence, probably a *palea*).[111] The distinction was quite possibly modelled upon Bulgarus' *Summula de iuris et facti ignorantia*, as Kantorowicz has shown.[112] In respect of *ignorantia facti*, the Romanistic criteria of *ign. crassa et supina, ign. quae caderet in virum discretum, ign. probabilis*, were introduced in the teaching of the canonists only after Gratian.[113] It is therefore interesting to

[108] Cf. Rufinus *ad loc.* ("... in superioribus capitulis," p.80 ed. Singer); *Summa Paris. ad loc.* (p.33 ed. McLaughlin; emend as follows: "quod autem dicit 'concubina hic intelligitur,' i.e. precedenti decreto secundo [= c.7 D.33]; *hic*, i.e. supra"); *Glos. ord. ad loc.* ("*hic* respicit id quod dixi supra proxima dist. cap. i.").

[109] Brava §12; Council of Bourges 1031 c.5, first sentence: Mansi 19.503.

[110] Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.* (Città del Vaticano 1935) 153.

[111] Above, IV B, No.6.

[112] *Studies* 79 f.—The problem of identifying other civilian glossators who may have influenced Gratian in one or another of his Romanizing dicta cannot be examined in the present paper. For No. 39 cf. above, II (*f*) at n.35; for No.15 (C.2 q.6 dict. *fin.*) see *art.cit.* (n.1 *supra*) in *Apollinaris* 21.127 at n.41 (Bulgarus? Irnerius? Henricus de Bayla?).

[113] *Kanon. Schuldlehre* 145 f., 154 ff.

learn (Brava §33) that in *Br.* the entire subdistinction of *ign. iuris* is absent, i.e. that the earliest recension seems to have had no Roman law whatever in this context.

(*d*) C.15 q.3 pr.: In discussing the question, "an mulier sacerdotem accusare ualeat," Gratian argues for the negative by saying, *inter al.*:

> Legibus quoque cautum est ut ob uerecundiam sui sexus mulier apud pretorem pro alio non intercedat, nisi forte suas uel suorum iniurias persequi maluerit. . .

The first part of the passage is apparently based on Dig. 50.17.2 (". . . Feminae . . . nec postulare nec pro alio intervenire nec procuratores existere. . ."); Dig. 3.1.1.5 [114] (". . . dum feminas [praetor] prohibet pro aliis postulare. . . ne contra pudicitiam sexui congruentem alienis causis se immisceant; . . . improbissima femina quae inverecunde postulans. . ."); the *nisi*-clause is borne out by the texts subsequently quoted in cc.1, 2 §1, 3 §2 (CJ. 9.1.12; Dig. 48.2.1; CJ. 9.1.4). But again, we notice confusion as to technical language: *intercedere pro alio* is an undertaking of surety or, generally, of an obligation for others; should Gratian have misunderstood the famous opening sentence of Dig. 16.1, "Senatusconsulto Velleiano plenissime comprehensum est ne pro ullo feminae intercederent," so as to mean prohibition of acting and pleading in court, i.e., as equal to the passages quoted above which speak of *postulare* and *intervenire pro alio?* The confusion of terms is understandable inasmuch as *intervenire* in the Roman sources covers either meaning,[115] and Dig. 50.17.2 "nec pro alio intervenire" was indeed construed by some glossators as referring to the *sc. Velleianum* [116]

[114] Quoted in 3 q.7 c.2 (No. 19: below, H).

[115] Cf. *Vocab. iurispr. rom.* s.v.

[116] Bulgarus, *Ordo iudiciorum*, app. § *Feminae* (ed. Wahrmund, *Quellen* 4.1 [Innsbruck 1925] 13f.) ". . . nec *postulare*, nisi pro se tantum; neque *intercedere*, nisi cum suum negotium gerunt, ut cum intercedunt pro [nisi pro *Wahrm.*] creditore suo; nec *procuratores* [pro curatore *Wahrm.*; existere *add.?*]

—which, however, in the context could be of no interest to Gratian.

But there might be another explanation. *Br.* omits the series of texts from Cod. Just. and Digest in cc.1-3 (No. 36); instead of c.1 (CJ. 9.1.12) Brava read the constitution CTh. 9.1.3 (Brev. 9.1.2), followed immediately by Dig. 48.4.8 (= c.3 §§3-4). Now, in CTh. 9.1.3 the incapacity of women for criminal actions is formulated thus: ". . . ut intendendi criminis publici facultatem non nisi ex certis causis mulieres habeant, hoc est si suam suorumque iniuriam *rell.*" A scribal mistake of *intercedere* for *intendere* would palaeographically be easy to explain, and this is how a first draft of Gratian's dictum might have developed into what we read now. His argument demands that criminal accusation be mentioned, and he may have written something like this: ". . . apud pretorem pro alio non inter*ueniat nec publicum crimen intend*at, nisi forte. . ." Once the second verb had been miscopied as *intercedat,* "emendation" and homoeography (*inter-inter*) would have done the rest.

(*e*) *Ibid.* dict. p.c.4: In the course of his tortuous and often criticized [117] argument on parallels and differences between *leges* and *canones* in regard to the right of accusation, Gratian appeals to an analogy from the law of celibacy and states: ". . . legibus enim soli cantores et lectores, canonibus autem etiam acoliti uxores ducere possunt." The *Correctores Romani* wrote a long criticism of this passage—Gratian's line of reasoning is indeed specious, since acolythes were not an order in the East—and pointed to Nov.22.42 as a source. Gratian, we may add, probably read this Novel as *Auth. Multo magis* of CJ. 1.3.19. And it is even more astonishing that this *Authentica* is adduced here, where it fits exceedingly ill, but is

litigando, nisi causa cognita pro parente . . ." (italics and emendations mine). See also the Accursian gloss *ad loc.* and Heumann-Seckel, *Handlexikon* s.v. *intervenire.*

[117] Cf., e.g., Stephanus Tornacensis, *Summa ad loc.* (" . . . unde Gratianum hic aut errare puto aut vagari . . . ," ed. Schulte [Giessen 1891] p. 221); *Summa Paris.* q.3 pr. (p. 175 McLaughlin), etc.

bypassed in the long tractate on celibacy, Dist. 26-34, where the differences between oriental and Roman discipline are repeatedly touched upon.[118]

In any event, the weakness of Gratian's logic in dict. pr. and p.c.4, as well as the considerable differences for cc.1-4 in *Br.*,[119] point to a particularly inept ultimate recension of the entire *quaestio* 3.

H. *Formal inconsistencies.* In addition to the interesting cases discussed by Vetulani (Nos. 22, 25, 28, 33, 34) [120] and the incidental observations made in the preceding pages, some further, striking instances of incongruities left untouched in the final revision should be noted.

(19) C.3 q.7 p.c.1-c.2. After this long *summula* composed from Digest and Code (for details see V.p.20f.) on disqualifications of judges, Gratian's words, " Idem testatur Felix papa et eisdem uerbis," make no sense. They were commonly referred by glossators and commentators to 3 q.5 c.11 (Ps.-Felix II, JK †230 c.12 §15 on the exclusion of *servi, infames,* etc. from testimony and accusation), but this text admittedly did not use " the same words " as any portion, and in particular the end, of q.7 c.2. In *Br.* however, the whole *summula* is lacking and " Idem testatur. . ." follows immediately upon c.1, quoted from *Romana sinodus,* " Infamis persona nec procurator potest esse, nec cognitor," which is based on Angilr. c.4 (ed. Hinschius p. 759 at n.32; inscr. " Sancta synodus Romana dixit," p. 758). And this text indeed is found *eisdem verbis* in Ps.-Felix I, *ep.*2.13 (JK †143, ed. Hinschius p.202). The *Correctores Romani* in their note on c.1 came close to recognizing this truth, yet failed to draw the obvious conclusion and repeated (on dict.p.c.2) the wrong reference to q.5

[118] D.28 p.c.13 §4; D.31 p.c.13; D.32 *passim,* etc.

[119] See above, *d* for cc.1-3 (No. 36); IV C, for c.4 (No. 37).

[120] V.pp.42-47; all but No.33 (11 q.1 p.c.9; V.p.46) are absent from *Br.* On Nos. 28 (5 q.3 p.c.1) and 34 (12 q.2 p.c.58-c.60) Brava's critical comments (§§ 51,61) are identical with those by Vetulani (pp. 44, 46f.); for No. 25 see below.

c.11, as does also Friedberg (n.89 *ad loc.*). Brava §45 pointed to the incongruity of the vulgate text, but without adverting how neatly c.1 and p.c.2 agree.

(25) C.4 q.2 & 3 p.c.2-c.3 has been competently discussed by Vetulani, who points out (p.43) that this Romanistic *summula* on witnesses belies Gratian's dict.pr., "secunda autem et tertia questio *eodem concilio* [i.e., Carth. VII] *uno eodemque capitulo* terminatur." One might add, as did Brava §48, that the final dictum (p.c.3), "sed obicitur illud beati Bricii, qui uoce pueri triginta dies ab ortu habentis innocens probatus est," with its solution,[121] makes sense only if read as an objection to the last sentence of c.1, ". . . ad testimonium autem intra annos quatuordecim etatis sue constituti non admittantur," which it follows directly (c.2 is a *palea*) in *Br.*

(38) C.16 q.1 c.40-p.c.40, a series of texts on clerical and monastic immunity, is perhaps the only instance of double recension in which Roman materials were demonstrably added from intermediary canonical sources.

c.40: C.J. 1.3.51, from the *Polycarpus*
p.c.40 (c.40 §3 *ed. Rom.*): CTh. 16.2.8 (not CJ. 1.3.1), from Ans. Luc. 4.13
——(*ibid.* §4): CJ. 1.2.5 (not CTh. 16.2.40), from Ans. Luc. 4.21

The proof for the derivative nature of the text[122] is the unquestionably Theodosian reading "meruisse perhibemini" (CTh. Ans. Grat.) for "meruistis" (CJ.) in the first fragment of dict p.c.40. That Gratian's text belonged to the tradition of Anselm of Lucca is further shown by the variant "fundos et mancipia" (Ans. Grat.) for the authentic "et uos et mancipia" (CThJ.; not noted in Friedberg).[123] But Gratian did

[121] Not properly understood in V. p.22.

[122] For other considerations see V.pp. 26, 34, 37. The *Polycarpus* is not available to me for collations.

[123] The *Correctores Romani* noted both variants (v. *meruisse*), but not their derivation from Anselm.

not follow Anselm's tacking onto the Theodosian text of the interpretation by Hincmar of Reims, " cum enim dicit—concluditur." [124] Thus an intermediary source between Anselm and Gratian is likely; and this assumption is confirmed by some variants in the second fragment, especially by Gratian's reading with the original (CJ 1.2.5), " post debite ultionis," against Anselm " predicte ultionis " (not recorded by Friedberg).

What the presumable intermediary collection was we cannot say at present. But the entire series of Roman texts is of uncertain position in some manuscripts; [125] it is not found at all in *Br.* Now, Gratian's own words which follow immediately (dict. p.c.40 *ed. Rom.;* dict. ps.II Friedb.), read thus:

> Hoc idem datur intelligi ex uerbis b. Siluestri, qui obedientiam minorum erga maiores assignans ait: " Abbas hostiario, monachus abbati sit subditus," . . .

and, as Brava §66 rightly observed, *hoc idem* can only refer to the end of the dictum preceding c.40, where the non-clerical status of monks in antiquity is discussed, but does not fit with the intercalated texts on immunity. The presence of the latter in this place is probably to be explained by the passage, " et praecipue monachos, licet non sint clerici " in CJ. 1.3.51: it provided Gratian with a civilian parallel for his remark p.c.39 §3, " monachos autem . . . monachos simpliciter et non clericos fuisse ecclesiastica testatur ystoria," and then by its context attracted the other material on immunities. After inserting the three pieces, Gratian forgot to change the wording of the first draft where he had interrupted himself; thus, the " seams " of double recension remain visible to the critical reader.

[124] Hincmar's *ep. ad Carolum imp.* (Mansi 16.757), quoting CTh. 16.2.8, was Anselm's model, not the Theodosian Code (Brev.) itself, cf. the inscription of the chapter in the *Coll. 74 tit.*, his immediate source; ed. Thaner, note *b* on Ans. 4.13 (p.197).

[125] *Ap.* p.133.

Summary list of texts discussed in this paper. (The letters A, B, C, etc. refer to the sections of pt. IV; other references are given by part and footnote.)

1 (B), 2 (F), 4 (D), 5 (B), 6 (B, cf.D, G[*c*]), 7 (D), 8, 10 (C);

11-13 (B), 15 (cf. G n.112), 16, 18 (D), 19 (H), 20 (D, cf. III n.51);

21 (cf.III n.49), 22 (B), 25 (H, cf.D), 26 (E), 28 (cf.H n.120), 29 (cf.III n.45), 30 (E);

31 (D), 32 (E, cf.D), 33 (cf. III n.51), 34 (cf. H n.120), 35 (B), 36 (cf. G [*d*]), 37 (C, cf. E at n.86), 38 (H), 39 (E), 40 (A);

41 (cf. III n.48), 42-43 (E), 44 (F), 45 (B), 46 (F).

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BENEFIT OF COUNSEL IN BRITTON

THE evolution of a humane criminal law was a gradual process in Medieval Europe. Power of punishment in the German tribes had been vested in the hands of the warrior-chief [1] and the priests.[2] The right of private execution existed among the primitive peoples who settled within the Roman Empire.[3] The accuser was vested with the power to execute the culprit.[4] The right of the relatives of the injured party to revenge themselves on the felon was assured by law.[5] Attempts were made to modify the violence of the blood feud by the Anglo-Saxon kings of England.[6] A common punishment in this rude age was the decree of outlawry declared by the court in the words: " Let him bear the head of the wolf." [7] Even aspects of the human sacrifice were present in the early criminal law.[8] William the Conqueror, in response to humane Christian influences, outlawed the death sentence in these words:

[1] Caesar, *De bello Gallico,* VI, 23.

[2] Tacitus, *Germania,* 7.

[3] *Leges Visigothorum,* ed. Zeumer, in *Monumenta Germaniae Historica, Legum sectio* I, 1 (1902), III, 4, 3.

[4] *Leges Burgundionum,* ed. de Salis, *ibid.* II, 1 (1892), 7; *Leges Visigothorum,* VIII, 3, 3.

[5] H. Brunner, *Forschungen zur Geschichte des deutschen und französischen Rechtes* (Stuttgart, 1894), pp. 528-532.

[6] *Dooms of Alfred,* 46, 46, 1; in F. Liebermann, *Die Gesetze Der Angelsachsen* (Halle, 1903), I, 78-81. (Henceforth cited as *Gesetze.*)

[7] *Year Book* 20-1 Edward I, *Statutes of the Realm,* I, 237: ". . . crie Wolvesved . . ."; *Select Cases from the Coroners' Rolls,* ed. C. Gross, Selden Society (London, 1896), p. 20; F. Snell, *The Customs of Old England* (London, 1911), p. 173. H. D. Trail and J. S. Mann, *Social England* (London, 1901-04), I, 424; *Doomesday Book seu Liber Censualis Wilhelmi Primi Regis Angliae,* Record Commission (London, 1783), I, 56b.

[8] Brunner, *op. cit.,* pp. 173-77.

> "I also forbid that any one be slain or hanged for any offence, but let him be blended (eyes torn out) or castrated. And this decree shall not be violated, on pain of my full forfeiture." [9]

The economic, social, and political insecurity of the period was mirrored in the harsh criminal legislation of Medieval England. For it was by the use of this law that the king hoped to mitigate the lawlessness of the age. The central authority was weakened by the private usurpation of public function.[10] The sovereign had too little power to insure the peace and safety of the realm. The granting of immunities, the evolution of private loyalties, and the threat of foreign invasion each contributed to weaken the crown.[11]

Criminal law was regarded by the crown as a weapon to defend society against those whose actions threatened its stability. The crown had no standing army or police force to protect people and property from those who were bent on harm.[12] Justice was harsh; the underlying premise in cases of felony or treason was that the accused was guilty. The insecurity of society and the weakness of the monarch were too great to tolerate any long-standing threat to their safety. The accused had few rights in appeals of felony or treason. He could not compel unwilling witnesses to testify in his behalf; preliminary interrogation of the prisoner was held in secret and the

[9] *Wilhelmi I. Articuli X,* in *Gesetze,* I, 488: "Interdico etiam, ne quis occidatur aut suspendatur pro aliqua culpa, sed eruantur oculi et testiculi abscidantur; et hoc praeceptum non sit violatum super forisfacturam meam plenam."

[10] *Leges Burgundionum,* II, 1, 7; *Leges Visigothorum,* III, 4, 3; VII, 3, 3; *Dooms of Wihtread,* 18, in *Gesetze,* p. 13; *Dooms of Aethelstan,* II, 2, p. 152; *Dooms of Edgar,* III, 2, p. 200; H. Cam, *Local Government in Francia and England* (London, 1912), pp. 100ff.

[11] F. M. Stenton, *The First Century of English Feudalism, 1066-1166* (Oxford, 1932), pp. 21ff; *Gesetze,* pp. 172ff; 268; 486ff.

[12] *Dooms of Ine,* 36, in *Gesetze,* p. 105; *Dooms of Aethelstan,* II, 1, p. 150; *Dooms of Aethelbert,* 2, p. 3; *Ibid.,* 9, p. 3; *Ibid.,* 21, p. 4. There are instances in the *Dooms* too numerous to mention. *Dooms of Alathaere and Eadric,* in *Gesetze,* pp. 9-11.

rules of evidence (even by the crudest of modern standards) did not exist.[13] And finally—and that is the subject of this paper—the accused was denied benefit of counsel in cases involving felonies or treason.[14]

With the Norman Conquest definite progress was made in the humanizing of civil procedure. The accused could defend himself " by oath " and " witness." But he could do this only in land cases. It was much later that this right was extended to criminal cases.[15] In cases of certain felonies such as homicide, the accused was dealt with in primitive fashion. He forfeited both his life and limb to the king; if he was not captured he was declared an outlaw and anyone who killed him might keep the spoils.[16] In the *Leges Henrici* (which seems to have been compiled shortly before 1118) we are still immersed in the murky atmosphere of the wer, the blood feud and the wit. In cases of felony the accused was permitted no counsel (*consilium*) but was required to answer the questions immediately.[17] In all other cases the accused could have counsel.[18] Misdemeanors did not constitute the threat to society that was implied in felonies.[19]

Glanville, writing in about 1187, makes a distinction between civil and criminal cases.[20] He differentiates between an

[13] F. W. Maitland, *The Constitutional History of England* (Cambridge, 1908), p. 231; Wm. Stubbs, *The Constitutional History of England* (Oxford, 1880), I, 76ff; E. Jenks, *The Book of English Law* (Boston and New York, 1929), p. 202.

[14] F. Pollock and F. W. Maitland, *The History of English Law* (2nd ed.; Cambridge, 1905), I, 211. (Henceforth cited as *H.E.L.*)

[15] *Très ancien coutumier,* ed. Tardif, in Société de l'histoire de Normandie (1881), XV, 3; *Select Charters and Other Illustrations of English History,* ed. Stubbs (8th ed.; Oxford, 1890), " Assise of Clarendon," 2, p. 143; *Doomesday Book,* 262b; *Leges Henrici,* 41, 10, in *Gesetze,* p. 568; 68, 2, p. 586; 81, 1, pp. 597-98.

[16] *Doomesday Book,* I, 56b.

[17] *Leges Henrici,* 47, p. 571.

[18] *Ibid.,* 46, 4, p. 570; 46, 5, pp. 570-71.

[19] M. M. Bigelow, *History of Procedure in England* (Boston, 1880), p. 229.

[20] Ranulf de Glanville, *Tractatus de Legibus et Consuetudinibus Regni Angliae,* ed. Woodbine (New Haven, 1932), I, 1: " Placitorum, aliud est criminale, aliud civile."

action based on a felony, which aims at " pure punishment," death or mutilation, rather than damages, and all other actions. Any action based on a felony is an appeal (*appellum*), the plaintiff does not " demand " nor " complain," he appeals (*appellat*) his adversary.[21] In appeals of felony the accused may not have counsel. But in civil litigation he may have a *responsalis*.[22]

By the beginning of the thirteenth century, significant changes were coming about in the criminal law. The county court ceased, in large measure, to have criminal jurisdiction.[23] From Cnut's day to the thirteenth century we see a significant increase in pleas of the crown.[24] The Angevins, following the principles established by their Norman predecessors,[25] denied that criminal jurisdiction belonged to the local suzerains.[26] The fabric of society was more closely knit than it had been before. The power of the crown was increased to the extent that it assumed responsibility for the fate of criminals.[27]

In Anglo-Saxon law the accused was permitted, in certain cases, to employ an oath taker. He was designated to speak prescribed words which he could repeat without error. Any error in the formula was looked upon as a sign of God's displeasure and would prove the man guilty of the crime charged. If the forspeaker erred, the accused could amend the formula. It was, according to Brunner,[28] a combination of the oath taker of ancient folk law and the Norman attorney (*attornatus*) that led to the agent-principal relationship. Pollock

[21] Glanville, XI. *H.E.L.*, II, 572.

[22] *Novellae*, ed. Schöll-Kroll (Berlin, 1895), 79, 1; A. Souter, *A Glossary of Later Latin to 600 A.D.* (Oxford, 1948), p. 353. Elsewhere in Roman sources *responsalis* (ἀποκρισιάριος) is an ecclesiastical ambassador, e.g. *Nov.* 37, 1.

[23] W. S. Holdsworth, *A History of English Law*, I (Boston, 1922), 72.

[24] *Dooms in Canute*, II, 12, in *Gesetze*, pp. 316-17; *H.E.L.*, II, 453.

[25] *Très ancien coutumier*, ed. Tardif, cc. 15, 16, 35, 53, 58.

[26] *Leges Henrici*, 10.

[27] *H.E.L.*, II, 461.

[28] Brunner, *op. cit.*, pp. 423-24.

and Maitland believe that the legal profession had evolved before the end of the thirteenth century to the point where they were making money for representing clients and giving professional advice.[29] Their representation introduced the relatively modern concept of speaking on behalf of the accused.

When were members of this class permitted to defend the accused in appeals of felony? Cohen conjectures that the humanization of law in respect to benefit of counsel in appeals was made manifest between the time Bracton stopped writing (ca. 1260), and the time Britton began his legal studies.[30]

It is in the Second Statute of Westminster [31] that the transition to the concept of benefit of counsel is completed. The accused possesses the general right to appoint an attorney in all cases which come before the justices in a given eyre. The humanization of criminal law has made great strides towards the protection of the accused in appeals of felony and treason. It is in the writing of Britton (ca. 1290), purporting to be issued by Edward I, that we get a more complete exposition of this development in the criminal law. Let us examine what he has to say on this point in the trial of felons accused of forgery:

> "Upon presentment of this felony, we will that the sheriff do cause all those who are indicted of it to be instantly taken, and their bodies kept in prison; and that they be brought before us or our Justices; and to the intent that no one may be unprepared with his answer, let those who are so taken have fifteen days at least, if they pray it to provide their defence." [32]

In appeals of felony, Britton recognizes the right of the accused to be defended by a serjeant at law (*servientes ad legem*) who would act as his pleader.

[29] *H.E.L.*, I, 211.

[30] H. Cohen, *A History of the Bar* (London, 1929), p. 191.

[31] *Second Statute of Westminster*, c. 10, *Statutes of the Realm*.

[32] *Britton*, trans. and ed. by F. M. Nichols (Washington, D. C., 1901), p. 21.

> "And as to the defence, the appellee may defend himself in this manner. . . . it shall be more necessary for the appellor to set forth the words orderly without any omission, that his appeal may stand, than for the defendant in his defence; and in every felony we allow the defendant to defend the words of the felony generally without treating him as undefended, so that for default of a word or syllable he be not adjudged undefended, but it shall be sufficient for him to say, that he is not guilty of such felony as the appellor lays to his charge, and that he is ready to defend the same against him by his body, in such a manner as the court shall award that he ought to do it, or by the country. And in cases of death none shall be held convicted for being undefended, but he shall be put to penance, until he be prepared to answer better, if he has spoken his defence by his own mouth; and if by a serjeant, who is avowed by the appellee, let the serjeant be amerced as above directed, and if he be disavowed, let him be punished by imprisonment and fine, and let the defendant provide himself with a better serjeant." [33]

However, Britton does not permit either the appellor or the appellees the right to receive attorneys in capital cases. He reiterates this point in Book VI, chap. 10. Unfortunately the abrupt ending of this chapter "Of Attorneys" indicates that we do not possess a complete manuscript of Britton. Therefore, a complete discussion "Of Attorneys" must wait upon the day that a scholar unearths one. Britton does say that if one desires to be represented by an attorney he must secure "letters patent" or secure his "appointment of parties before the Justices in eyre." However, their use is limited by Britton. He says:

> "Attorneys cannot be made by everyone; for an infant under age, a deaf and dumb person, an idiot, a man simply mad or otherwise without discretion, a person accused of felony, or any one who is forbidden by us to do so, or a leper expelled from society, cannot make an attorney." [34]

[33] *Ibid.*, pp. 84-5.

[34] *Ibid.*, p. 610.

In cases of felony the accused is not permitted an attorney (*attourné*) but he is allowed the use of a serjeant. What is the distinction between the two? The attorney represents his client, he appears in his client's place, while according to Pollock and Maitland,[35] and Holdsworth,[36] the serjeant speaks on behalf of the plaintiff or defendant " who is present in court either in person or by attorney." Such a distinction is of course suggestive of present day English practice. It may be that we are dealing here with the evolution of the principle of representation, one of the most perplexing of the unsolved problems in the field of medieval studies. The concept of representation may have evolved in Britton to the point where the principal was bound by the acts of his agent to the extent that he was unable to disavow him. The contrary seems to have been true in the case of serjeants. Britton, in permitting the appellees and appellors to employ serjeants in capital cases, says:

> " And our will is, that if the appeal be pronounced by the mouth of a serjeant, and be abated on account of its being ill set forth, or through other default of the serjeant, who ought to understand the art of pleading, the serjeant himself shall be amerced one hundred shillings; and if there was secret malice in the act, and he be convicted thereof, then let him be sent to prison and suspended from his office." [37]

It appears then to be a matter of degree. The acts of the serjeants at law (*servientes ad legem*) can be disavowed, while those of the attorneys cannot. However, the evidence on this point is far from conclusive. Besides the obscurity of the origin of representation in the Middle Ages, and the lack of a complete manuscript of Britton, we are faced with the problem: to what extent was Britton expressive of contemporary legal practice? Brunner concludes that Britton's work represents a scheme of law rather than an expression of existing English

[35] *H.E.L.*, I, p. 216.

[36] Holdsworth, *op. cit.*, II, 311.

[37] *Britton*, p. 84.

practice.[38] Britton's treatise may have had its origins in Edward's plan to codify English law in very much the same way as Justinian had Roman Law codified.

In any case, Britton permitted the accused to have benefit of counsel in instances of felonies punishable by death. This humanization of legal theory, if not practice, seems to have been discarded in the subsequent centuries. In the *Year Book* 9 Edward IV we read: "And note that the defendant in indictment of felony shall not have counsel against the King if it is not a matter in law; but in appeal it is otherwise." [39] Fortescue, in *De Laudibus Legum Angliae,* written between 1460 and 1470, makes no reference to the right of the accused in criminal cases either to call witnesses or have counsel.[40]

Holdsworth suspects that the reason the accused was not permitted counsel after Britton, in criminal cases involving felonies, was the gradual elimination of appeals of felony during this period.[41] Pollock and Maitland, state that there was a reduction in the number of crimes classified as felonies ("which place life and limb at the King's mercy") as early as the twelfth century.[42] In Britton himself, we see instances of the reduction in the number of felonies. He says:

> "An accident is that which occasions the death of a man without felony, as where people die suddenly without any sickness, or fall into the fire or into the water, and lie thereby until they are quite dead. A mischance is where a man is killed by a fall from a tree, ship, boat, cart, horse, or mill, or in the like cases, where no felony is committed, and in which there is no need of raising the hue and cry, or making any presentment by the kindred of the deceased or by the township at the next county court, but the coroner's inquest is sufficient." [43]

[38] Brunner, *op. cit.,* p. 434.

[39] *Year Book,* 9 Edward IV, Pl. 4.

[40] J. Fortescue, *De Laudibus Legum Angliae,* CXXXII.

[41] Holdsworth, *op. cit.,* II, 260ff.

[42] *H.E.L.,* II, 458-59.

[43] *Britton,* p. 33; p. 36.

There was a decline in the number of appeals of felony during the subsequent period. But there was a corresponding increase in the humanization of the criminal law. In the sixteenth century, we see an extension of Britton's concept of benefit of counsel. Christopher Saint Germain, in 1523, in his *Doctor and Student,* recognized the right of even the indigent to have counsel assigned in appeals of felony.[44]

By Coke's day, the right of benefit of counsel had been transferred to indictments; in questions of law the courts were to assign counsel to the poor even when not requested.[45] Thus by the seventeenth century both rich and poor were entitled to counsel in law matters. This is to the eternal honor of the English common law as it evolved from Britton's day; and to the eternal disparagement of the current common law of the State of Maryland in 1942 (*Betts v. Brady,* 316 U.S. 445).

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[44] Christopher Saint Germain, *The Doctor and Student or Dialogue between a Doctor of Divinity and a Student in the Laws of England, together with questions and cases concerning the Equity and Conscience thereof,* rev. and ed. by Wm. Muchall (Cincinnati, 1874), pp. 256ff.

[45] Edward Coke, *The Third Part of the Institutes of the Laws of England, Concerning High Treason and other Pleas of the Crown and Criminal Causes* (Printed for E. and R. Brooke, Bell-Yard near Temple-Bar, 1797), pp. 136-137, 29, 33-34, 230.

FROM CONTRACT TO STATUS

Some Aspects of the Reception of Soviet Law in Eastern Europe *

IT is uniformly admitted in Eastern Europe under Soviet domination that legal institutions enacted throughout that area ofter World War II are modelled after the Soviet pattern. One of the Soviet jurists whose attention has been primarily directed to recording and analysing legal events in countries of "popular democracy" in Eastern Europe, at a meeting of the Congress of Czechoslovak Lawyers in 1949, characterized the development of law in Eastern Europe as follows:

> "At the present time the countries of popular democracy, having liquidated the capitalist order, are achieving in the development of their new law, not the reception of Roman law patterns, but of the new highest type of law, socialist law." [1]

The reception of the Soviet law, which is currently equated in Eastern European legal literature with "socialist law," provides a guiding principle for appraising the fundamental characteristics of the vigorous activity of communist governments in that part of the Soviet empire.

The proposition expressed in the title of the present study is a reversal of the famous formulation coined by Sir Henry Maine describing the development of law, as he saw it at the height of the Victorian era and of the might of the British Empire:

> "The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, December 12, 1952.

[1] Mankovskii, *Panstwo i Prawo* (1950), No. 1, p. 33; see also Aleksandrov, *Sovetskoe Trudovoe Pravo* (1949), pp. 369-375.

> of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account. Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract . . . The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated . . . all the forms of Status . . . were derived from . . . the power and privileges anciently residing in the Family . . . We may say that the movement of the progressive societies has hitherto been a movement from Status to Contract." [2]

Although Sir Henry Maine limited his formula to property and relations of civil law, it equally applies to public law. Status was replaced in legal theory and practice by Contract as regards such relationships as citizenship and democratic government. The theory of social contract stands in one form or another behind the binding force of laws. "People subject to the law," as another famous quotation runs, "should be its author; only those who form an association may regulate the conditions of the society." [3] The concept of Contract is thus directly related to political liberty and rights in public and civil law, representing an inviolable realm serving the individual.

Citizenship is perhaps most illustrative of developments in public law described here. The principle, *Nemo exuere potest patriam suam,* was gradually replaced in the course of the nineteenth century by the principle of free choice. The practice initiated by the United States in the so-called Bancroft treaties (1868) led to the recognition that the state is under obligation to release its citizen from his former allegiance if he has acquired the nationality of another state. Modern legislation and international conventions have generally reflected a tendency to eliminate dual nationality, and to modify the automatic effect of marriage upon the nationality of the woman. The mode of acquiring nationality by an immigrant

[2] Henry Sumner Maine, *Ancient Law* (1907), p. 172.

[3] J. J. Rousseau, *Contrat Social,* Chapter VI, Title vi.

was becoming, to an increasing degree, the subject of legal regulation. The tendency was to set formal requirements which objectively determined conditions for acquiring the nationality of a country. In certain countries foreigners could claim naturalization as of right and could seek judicial redress in case of refusal. On the other hand it became a practice, with the development of international trade, to treat foreigners, once they were admitted to residence and business, on an equal footing with nationals, with the exception of political rights. Certainly foreigners are equal in the legislation of most countries as regards protection of life and property.

In the field of penal law the consequences of the movement of European law from Status to Contract are not perceptible prima facie. However, the modernization and humanization of European penal law are a direct consequence of the recognition of the position of the individual as a subject of law. Strict formulation of indictable offenses in European penal codes, the principle of non-retroactivity of laws, trial by jury, the independence of courts from political authority—all these were designed to serve the protection of the individual's rights. On January 21, 1790 the French Constituent Assembly, applying the principles of the *Déclaration des droits de l'homme* of August 26, 1789, proclaimed the equality and the personal effect of penal sanctions and abolished general confiscation. Penal laws of Europe established firm frontiers protecting individual liberty and the system of contract. When the tide of the progressive movement began to ebb, the Permanent Court of International Justice, in the case of certain Danzig Decrees, which provided for the prosecution of acts "deserving of penalty according to the fundamental conceptions of penal law and sound popular feeling," characterized the new trend and its departure from the accepted patterns as follows:

> "A judge's belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the facts; so is his opinion as to what is condemned by sound

popular feeling. Instead of applying a penal law equally clear to both the judge and the party accused, as was the case under the criminal law previously in force in Danzig, there is a possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offense, because its criminality depends entirely upon the appreciation of the situation by the public prosecutor and the Judge. Accordingly a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone, replaces a system in which this knowledge was equally open to both the judge and the accused." [4]

In the final analysis, the system of contract and the position of the individual in modern society, as it was viewed by Maine, depended upon the system of ideas for which German jurisprudence has coined the term *Rechtsstaat*. The rule of law has been linked in the human mind with the modern state and its functions, as determined and circumscribed by law.

In fact, legal thinking has traditionally sought a foundation for the obligatory force of laws outside the coercive power of the state. The high authority of Roman law in Medieval and Renaissance Europe is one of the many examples of the intrinsic authority of the law. Positive law identified with Divine or natural law, or with reason, expressed interests towering above the momentary desires of political forces. The Renaissance world freed itself from the concept of a limited scope of human law-making and established the principle of the unlimited legal regulation of human affairs; but it found its self-limitation in reviving the ready patterns of Roman law. The authority of the law to limit the power of government sprang directly from the fact that law was independent and separate from the ruler. As the government had to an increasing extent to rely on the consensus of the governed, and as the rule of law became more and more identified with

[4] Permanent Court of International Justice, *Advisory Opinion, Consistency of certain Danzig Legislative Decrees with the Constitution of the Free City* (1935), A/B No. 65, p. 53.

democracy, law was again made independent of politics by making the state itself expressive of the rule of law.

Nowhere was this idea better expressed than in Montesquieu's description of what he understood to be the constitution of England. Law and its instrument, the courts, live their own life free from the interference of politics. On the other side of the Atlantic the concept of the state governed by law and able to resist momentary political tendencies emerged with the birth of the American Union. Rousseau, Seyes and John Stuart Mill saw the state and the rule of law as representative of the interests of all. The Glorious Revolution and the French Revolution were, in a sense, revolts against the rule of a single privileged class and against the law of a single class. The nineteenth century molded the concepts of the preceding age into a unified concept of the *Rechtsstaat,* in which conflicting interests of social groups, however sharply opposed, found their solution through the action of the supreme arbiter, the state. The strength and attractiveness of this tradition is best demonstrated by the fact that, although it was Marx who denied to law an independent role and constructive function in social life, reformist socialists made of the *Rechtsstaat* the basic moving force in their theory of historical progress.[5]

The concept of the "legal state" presumed the independence of state, society, and individual. This in turn was reflected in the independent growth and development of the law standing above them all. Court-made law, administrative law, administrative courts and tribunals, the administration of government by professionally trained civil servants, the theory of local government as opposed to centralized state administration,—these are some of the modern concepts belonging to this order of thought. In the last analysis the rule of law was expressive of the fundamental conflict of human interests and rights. As Dean Pound so admirably demonstrated, this con-

[5] Hermann Heller, *Die politischen Ideenkreise der Gegenwart,* (Breslau, 1926), p. 80. See also: Max Adler, *Die Staatsauffassung des Marxismus* (Wien, 1919), p. 19.

flict is an inherent characteristic of all modern institutions of law. It results from the "twofold task of the legal order in upholding the general security and at the same time protecting the individual life." [6]

The movement from Contract to Status in Eastern Europe is intimately connected with the theory and practice of government according to Marxist orthodoxy in the Moscow version. The Soviet government, and in its wake, "popular government" in Eastern Europe, claim to represent a higher form of democracy. It may be said that the theory of contract as the foundation for the exercise of public power according to the traditional concept of democracy presupposed at least two basic rights of the electorate: the right of determining the goals and aims of government, and the right of exercising control over administration. Financial criteria provided an objective set of values to judge the record of those in power. One of the basic functions of national representation is to make public basic data and information on the business of government. However, the socialist theory [6a] of state and society denies to the collective will of the electorate the power to influence the course of national affairs. Here, laws of history, laws of economic development are fully independent of social will and preferences. The will of the people is sovereign only when the course of action prescribed by popular enactments follows the direction indicated by the laws of history: "Laws of development, necessity, and causality exist in natural and social life objectively and independently of human will." [7]

Since the five-year plans have become a permanent feature of Soviet life the art of government has been equated in Soviet theory with the discovery of the laws of change.[8] As the Com-

[6] Roscoe Pound, "Individualization of Justice," *Fordham Law Review* (1938), No. 2, p. 153.

[6a] The term "socialist" is used in this paper in the meaning attributed to it in the Soviet theory of state and law.

[7] Trainin, *Sovetskoe Gosudarstvo i Pravo* (1949), No. 2, p. 2.

[8] Fedkin, *Sovetskoe Gosudarstvo i Pravo,* No. 6, pp. 11ff.

munist Party has the monopoly of understanding best the theory of historical change, it has also the monopoly of planning government policies:

> "Every society, irrespective of its form, follows laws based on objective necessity. The objective necessity manifests itself differently in different societies. [In the socialist society] this necessity acts as the economic law, conditioned by the external and internal situation of the society, by all historical antecedents of its developments; this objective necessity perceived by men infiltrated into the conscience and the will of the people—in the persons of the builders of the socialist society, as the leading and organizing force of this society, the Soviet state and the Communist Party, directing the activity of the masses." [9]

Consequently, public control is also a function determined and regulated by the party. Public opinion may operate only at the command of the supreme organizations of the Party, and therefore the public as such is denied the means to form its own judgment. Vital information concerning the basic function of socialist government—the management of the national economy—is never made public. Government policies concerning the direction of national investment, the economic returns of the state enterprises and of the government-owned state farms, exchanges in the course of the international trade between socialist states, and particularly with the Soviet Union, price-policies,—all these are state secrets closely guarded. It is enough to scrutinize the yearly budgets of socialist states in Eastern Europe to realize how flimsy the foundations of public control of government business and policies are. It is a constant feature of socialist budgets that they provide no particulars concerning their most important items, namely the expenditure of sums allotted for national investment. None of the budgets of "people's republics" includes

[9] *Pod Znamenem Marksizma* (1943), No. 7-8, p. 45; see Gsovski, *Soviet Civil Law* (Ann Arbor, 1948-9) I, 175ff.

particulars concerning Soviet loans, which are advertised from time to time as the supreme proof of the disinterested assistance of the first land of socialism. As the power of the Party and its control of the state and the society grow, the business of government becomes more and more remote from the masses. Administration takes the place of social initiative and action. Social organizations are transformed into seats of party-appointed bureaucracy, as is indicated in the rarity of congresses and conferences of social movements.

The process of law-making in Eastern Europe has changed fundamentally. Socialist parliaments have neither the machinery nor the opportunity to exercise legislative initiative. Major pieces of legislation such as constitutions, labor codes, civil and penal codes are prepared by government agencies. At best, when a piece of legislation with political significance is introduced, it is prepared by special committees of the national communist parties. Acceptance and approval by public opinion and public discussion of such important pieces of legislation as constitutions or long-term economic plans is sought prior to their introduction in parliament. The parliament, when it is finally called to deliberate and pass upon such a measure, is permitted only to acclaim the labors of the political leaders of the country. On the occasion of the enactment in 1952 of the codes of civil and penal procedure, and the law on the organization of the judiciary in the German Democratic Republic (Eastern Germany), the official organ of the Ministry of Justice compared the work of the legislators in 1952 to that of the German legislators in 1877. At that time modern penal legislation was enacted in Germany after the prolonged activity of a complex apparatus, composed of representatives of the academic world and the legal professions. Prepared drafts were given a thorough airing in the press, in professional periodicals, and in the *Reichstag*. After the codes had been adopted, two years and eight months were allowed to familiarize the judiciary, the legal profession, and the public with the provisions of the new laws.

> "And to-day," the official mouthpiece of the East German Ministry of Justice triumphantly writes, "not only was the entire legislative work done in weeks instead of years, but . . . our judges were given . . . scarcely two weeks before they had to proceed with the enforcement of the new code of penal procedure." [10]

Obviously, the main reason for the superior efficiency of the communist legislator in Eastern Europe is the fact that the entire process of legislation was reduced to drawing from the vast experience of the Soviet Union. Of equal importance, however, is the fact that Soviet Marxism claims to be able to provide answers to every question regarding the purpose and goals which socialist laws are designed to achieve. Furthermore, the socialist legislator is spared the labor of searching for a happy medium satisfactory to various conflicting social interests. Socialist legislation is inspired by the endeavor to meet the desires and the interests of the future society which it aims to create.

One of the major consequences of the various socialist enactments is the fundamental change in the position of the individual. We may notice a process of gradual amalgamation, whereby the individual is absorbed in the society, and his interests become subordinated to those of the state.

East European legislation in matters of nationality provides perhaps the best illustration of this novel development. The main lines of the legislation in this field may be summarized as follows: Acquisition of foreign nationality has been made dependent not only on fulfilment of conditions determined by the law of the new country, but also on agreement by the authorities of the old country. Acquisition of new nationality without the permission of these authorities carries no effect as regards the country of origin. Marriage to a foreign national has no effect on the nationality of the woman. In Yugoslavia marriage to a foreigner requires the permission of the minister

[10] *Neue Justiz* (1952), No. 10, p. 433.

of justice, for validity in the eyes of the law.[11] In Rumania the permission of the Presidium of the Grand National Assembly must be obtained.[12] A national of a people's democracy can be deprived of his nationality by administrative decision as punishment for actions contrary to the interests of the socialist state, such as participation in political activities directed against the "popular democratic order," illegal departure abroad, or failure to comply with the demand of the competent authority to return home from abroad.

Deprivation of nationality is followed by the confiscation of the entire property of the offender and of his family. Some laws make the confiscation of family property automatic, others limit the effects of the confiscation to the property of the offender, unless otherwise stated in the decision. The same applies in regard to the effect of the deprivation of nationality on the status of wife or children.[13]

The position of the individual was basically affected by the expansion of government control in various fields of economic activity and by progressive nationalization or socialization of new branches of production. Outwardly, it was marked by the enormous expansion of penal provisions, in the matter of offences committed in public office. Under traditional concepts such offences can be perpetrated only by government officials, and involve special penal responsibility for damage to the public or private interest; a responsibility resulting from the specific duties of a government agent. Since in a socialist state the distribution of commodities and administration of economic resources are functions of the government, the concept of offences in public office has been greatly ex-

[11] *Yugoslav Laws* (1948), No. 36.

[12] *Rumanian Laws* (1950), No. 31.

[13] Polish Nationality Act, January 8, 1951 (*Polish Laws* [1951], No. 4); Bulgarian Nationality Act, March 6, 1948 (*Bulgarian Laws* [1948], No. 70); Czechoslovak Law on the Acquisition and Deprivation of Nationality of July 18, 1949 (*Czechoslovak Laws* [1949], No. 194); Hungarian Nationality Law No. LX of 1948; Rumanian Nationality Decree of July 6, 1948 (*Rumanian Laws* [1948], No. 125).

panded. In the opinion of the East German Supreme Court an employee of the distribution center for government stores performs government functions. Such distribution center is a part of the state organization, and is concerned with the fulfilment of the economic plan of the state.[14] The Polish Supreme Court qualified contraventions committed by the employees or members of cooperative organizations as offences in office, although such cooperatives are not owned by the state and nominally are not under government control.[15] In another case all persons employed in institutions and enterprises in which the state holds a financial interest, or exercising functions delegated by the state were classed as government agents.[16] In still another case the Polish Supreme Court expressed the opinion that even a worker on a bench or a milkmaid on a government farm may be considered a government agent in public office and treated accordingly.

Negligence in the execution of simple duties, such as transporting raw materials for manufacturing from one workshop to another, would not in itself justify the application of penal provisions covering offences in office. However, if such negligence results in damage to factory equipment or temporary stoppage of a machine, then stricter provisions apply.[17] Although it is contrary to the expressed principles of European laws, the consequence is a wider application of penal liability without intention or guilt. In 1950 the Polish Supreme Court reviewed the case of a tug-boat skipper, who by faulty maneuver and error in judging the thickness of ice-floes caused a collision with a ship. The Supreme Court found him guilty of an offence in office, although it was evident from the circumstances of the case that collision resulted only from the skipper's lack of experience. He had been promoted to a position of command "by way of social advance," which seems to

[14] *Neue Justiz* (1952), No. 9, pp. 428-9.

[15] *Panstwo i Prawo* (1952), No. 11, pp. 636-7.

[16] *Ibid.*, p. 648.

[17] *Ibid.*, p. 639.

indicate that it was a political promotion without regard to qualification for a highly skilled job, and that the consequences were unavoidable.[18]

The reappearance of general confiscation of property in East European legislation represents another step in the same direction. Confiscation of the entire property, not only that which is actually owned, but also that which the offender may acquire in the future, as some of the socialist laws want it, has been given wide application. Confiscation is generally decreed for offences which carry the connotation of political nonconformism: crimes against the socialist economic order and political crimes. Confiscation constitutes a class measure aiming at the elimination of hostile elements from the social and economic fabric. As a supplementary punishment it may be decreed by administrative authorities in all cases which come under their jurisdiction. In particular, it usually follows confinement in forced labor camps. Persons hostile to socialism have no right to own property.

Another feature of socialist penal legislation is the absence of a clear delimitation between the prohibited and the permissible. Various post-war enactments in Eastern Europe have abolished to a large extent the principle of strict definition of indictable offenses. In the first place, so-called "analogy clauses" were adopted in some East-European countries, following the example of the RSFSR Penal Code of 1926. The Rumanian decree of April 30, 1949, on the amendment of the Penal Code stated (section 2, subsection 2):

> "Acts considered dangerous to society are punishable even if they are not specifically qualified by law as offenses. In such cases, the grounds and the limits of responsibility are determined according to provisions of law for similar offenses."[19]

[18] *Ibid.*, p. 650.

[19] *Rumanian Laws* (1949), No. 13. Criminal practice in the Soviet Union and Eastern Europe is strikingly reminiscent of the institutions of the National-Socialist penal law. Section 2 of the German Criminal Code, as amended on June 28, 1935, provided for punishment of an act deserving "a penalty according to the basic principle (*Grundgedanke*) of a criminal statute

The Bulgarian Penal Code of 1951 stated the same principle in different words:

> "A socially dangerous act shall be considered a crime even if not expressly so determined in the law, if its elements are similar to the elements of some of the crimes defined by the law." [20]

At the same time the definition of a "socially dangerous act" is in itself elastic enough to permit stretching its provisions to cover almost any action which in the opinion of the authorities may conflict with the official policy. The Rumanian decree defines socially dangerous acts as follows:

> ". . . acts dangerous to the community . . . actions or omissions which violate the social economic or political structure or the security of the Rumanian People's Republic, or which disturb the legal order established by the people under the leadership of the working class." [21]

In those countries where for some reason the Soviet example has not been followed, a different approach was taken. The General Part of the Hungarian Criminal Code does not include an "analogy clause." However, its basic provisions expressly proclaim the political purpose of the administration of justice, and set extremely broad and loose limits to the definition of what is a punishable act, thus indicating that the participation of the Hungarian People's Courts in socialist construction should not be hamstrung by technicalities:

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and to the people's sound sentiment (*gesundes Volksempfinden*). If no particular criminal statute may be directly applied to the act, the act shall be punished under the statute the basic principle of which best fits the act." Gsovski, *The Statutory Law of Germany* (Washington, Library of Congress, 1947), p. 4; see also Hall, "Nulla Poena Sine Lege," *The Yale Law Journal*, 47 (1937), 165-193. This analogy clause was only one of the many instances of a departure from traditional concepts of administration of justice that characterized the Nazi conception of law: a means of fostering the political mission of which the state itself was considered an instrument.

[20] *Bulgarian Laws* (1951), No. 13.

[21] *Rumanian Laws* (1949), No. 25.

"The new General Part of the Criminal Code corresponds to the economic, social, and political transformation which has taken place in our country following the liberation, and enacts those principles of the penal law which serve the interests of socialist construction and the protection of social property.

Any act of commission or omission is considered to be socially dangerous, which violates or endangers the political, social, or economic order of the Hungarian People's Republic, its citizens or their rights." [22]

Sometimes even the pretense of separating the permissible from the prohibited is dropped. The Rumanian decree of April 30, 1949, on the punishment of economic offenses declared as punishable: ". . . all acts committed with the intention of obstructing the efforts of the working people on their road towards the creation of a socialist economy . . ." [23]

In East Germany no new socialist penal code has been enacted as yet; in cases which cannot be dealt with under more specific provisions, the courts have recourse to Article 6 of the 1949 Constitution, which ruled in a most general manner that:

"Incitement to boycott of democratic institutions or organizations, incitement to attempts on the life of democratic politicians, the manifestation of religious and racial hatred against other peoples, militaristic propaganda and warmongering, as well as any other discriminatory act, are felonious crimes within the meaning of the penal code."

The East German Supreme Court, however, deemed it necessary to give these provisions an extensive interpretation to cover offenses committed without intent. It adopted a doctrine stating that the mere membership in a prohibited association makes the offender guilty of "Kriegshetze" (warmongering).[24] In the case of an East German policeman who

[22] Law II of 1950 (*Hungarian Laws* [1950], No. 85). Cf. Czechoslovak Criminal Code of June 12, 1950 (*Czechoslovak Laws* [1950], No. 39); Yugoslav Criminal Code of March 9, 1951 (*Yugoslav Laws* [1951], No. 13).

[23] *Rumanian Laws* (1949), No. 183.

[24] *Neue Justiz* (1952), No. 8, p. 369.

escaped to the West with his uniform, and was detained after his return home, the lower court came to the conclusion that none of the elements of the crime of "Kriegshetze" or of the preparation to war were present. The Supreme Court reversed this decision, found the offender guilty of a crime under Article 6 of the Constitution, because as a member of the People's police the accused had betrayed the trust of citizens in his office.[25]

In People's Poland, neither the "analogy clause" nor a blanket provision similar to that of Article 6 of the East German Constitution has been enacted. However, in an opinion given at the request of the Minister of Justice, the Polish Supreme Court stated that law courts should reject the formalistic interpretation of laws, because:

> "Construction of laws must not obstruct or hamper the defense of the socialist economic system but should serve its purpose. . . . It must take into consideration the purpose of the law, namely socialist legality, the protection of the interests of the workers, of the peasant masses, and of the working intelligentsia. Interpretation of the law should not be concerned with its literal meaning, but should aim at the realization of its social purpose and take into consideration that it is an expression of the will of the broad social masses."

In application of this principle, the Court indeed determined--going directly against the wording of the law—that the stocking of private larders without the intention of reselling such commodities was speculation and dishonest machination.[26]

Rejection of the "formalistic" approach to problems of the construction of laws inherited from the "capitalist" state is sometimes expressed in the theory that the change of regime has influenced the content of the inherited legal system. In Hungary a government decree ordered the Supreme Court to revise those rulings made by the former Royal Supreme

[25] *Ibid.*, No. 9, p. 386.

[26] *Panstwo i Prawo* (1950), No. 7, pp. 146-150.

Court " which do not correspond in spirit to the aims of the Hungarian Democracy." [27] The East German Supreme Court on several occasions expressed the opinion that ". . . with the new state order, the legal system taken over by the new state has acquired a new meaning . . ." [28] In the opinion of Frau Hilde Benjamin, vice-president of the East German Supreme Court, and the chief keynoter of East German administration of justice, this equally applies to the Nazi legislation. In the hands of the socialist state such legislation is an instrument of progress.[29] The same idea is also expressed in the formulation, uniformly adopted in Soviet controlled Europe, that courts are instruments of politics and that each court decision is a political action.[30]

The liberties which East European courts take with the laws in force reflect the constant struggle of the socialist state with the very idea of law, which by nature represents stability and predictability. This applies equally to " capitalist " and " socialist " law. The constant movement in socialist society from contract to status turns the positive legal rule into an obstacle in government politics. Hence broad and loose formulations are needed and the accepted interpretation of the law has continuously to be overturned in order to meet momentary situations in practice.

A Soviet jurist, speaking of the problem of guarantees for the defendant in criminal trials, resorted to the following statement in order to preserve the fiction of the identity of interests of the individual and of the socialist state:

> ". . . if we say that Soviet law protects the interests of the Soviet citizen we mean those interests which are identical with the interests of the state, and we may not think of anything else. Certainly, the Soviet state and its legislation cannot

[27] *Hungarian Laws* (1950), Decree No. 4338 MT.

[28] *Neue Justiz* (1952), No. 3, also *Ibid.*, No. 10, pp. 433ff.

[29] Hilde Benjamin, in *Neue Justiz* (1951), No. 4, p. 152ff.

[30] *Ibid.*, p. 155.

guarantee the interests of those citizens who endeavor to live the life of parasites." [31]

There is no better illustration of the consequences of this approach to administration of justice than the sentence of the regional court of Sofia passed in 1947 in the case of the Bulgarian peasant leader Petkov:

> "The opinion that the confession of an accused person may have no value of evidence in the case of another accused person unless corroborated by some other evidence produced in the course of the trial, is not legally sound . . . The character of evidence . . . is determined by the nature of trial . . . In the course of a trial of conspirators, in cases dealing with plots and coups d'etat we must not insist on evidence, minutes, decisions, identity cards of the members of the plots, or numbers of such cards. One must not expect that conspirators would have their criminal activity certified before the notary public . . . (Vishinskii, Prosecutions, 1938, pp. 442–443). According to the 'Theory of Evidence in Soviet Law' (1946 ed. pp. 209ff.) by Vishinskii, In such trials the problem of evidence and its validity regarding the explanations of the accused, in particular as these explanations implicate their accomplices in crimes committed together, must be determined according to the nature of the case . . . In trials of conspirators, of criminal organizations . . . of anti-Soviet and anti-revolutionary groups . . . explanations of the accused must be accepted as primary and conclusive evidence." [32]

The core of the problem lies of course within the field of civil law. Here too, the final effect of socialist legislation is total subordination of the individual to the interests of the collectivity. A Polish enactment which supplied fundamental principles to the civil legislation in force stated the following rule:

> "Law shall be applied and construed in accordance with the principles of the order and aims of the popular state. No-

[31] Kaminskaia, *Sovetskoe Gosudarstvo i Pravo* (1950), No. 5, p. 52.

[32] *Le Procès Nicola Petkov* (Sofia, 1948), pp. 429-430.

body shall use his rights in a manner contrary to the principles of social life in the popular state. Any legal transaction contrary to law or rules of social life shall be invalid. Any declaration of will shall be interpreted in accordance with the principles of social life in the popular state." [33]

The Czechoslovak Civil Code enacted in 1950 expressed the same idea in different words.

> " The social order of the People's Republic and its socialist construction guaranteed by the Constitution is the foundation of private rights " (sec. 1). " Nobody shall abuse his private rights to the prejudice of society " (sec. 3).[34]

A distinguished Soviet professor explained the purpose of Soviet civil law by stating tersely that the state by its civil legislation sets " limits not to itself but to its citizens." [35] Vishinskii saw the function of the civil law as supplementing the administrative regulation of the state:

> " By Soviet socialist civil law we mean a normative system of social behavior established by the government in order to regulate those property relations between citizens themselves, and those between citizens and the state and socialist enterprises, institutes and organizations, or between those entities themselves, which are not under the regulation of the state administration." [36]

Consequently, within the socialist economy, the function of Contract as determinative of mutual rights and obligations has been subject to important modifications. It has been fully pressed into the service of the economic plan. Planned delivery contracts, or " planned contracts " as they are termed, put into effect directives and provisions of the yearly economic plan. The aim of the planned contract is to strengthen discipline in the execution of the plan by several industrial

[33] *Polish Laws* (1950), No. 34.

[34] *Czechoslovak Laws* (1950), No. 141.

[35] Quoted after Gsovski, *op. cit.*, I, 319.

[36] Vishinskii, *Sovetskoe Gosudarstvo i Pravo* (1939), No. 3, p. 22.

groups and individual enterprises. Laws of socialist countries distinguish two categories of such contracts: (1) general contracts entered into between the managements of various branches of industry, to ensure the delivery of raw materials necessary for the execution of the production and delivery plans, and (2) detailed contracts to cover the delivery of goods between the individual establishments and enterprises.[37]

An analogous system of planned contracts governs labor relations in nationalized industries. Collective agreements between state industrial management and the trade unions were abandoned for a time in the Soviet Union. In 1947 the Soviet government revived the practice of concluding such contracts with labor unions in order to strengthen labor discipline in Soviet industries. However, collective bargaining is limited by the necessity to ensure uniformity required by the overall economic plan, and none of the essential points of the collective contract is subject to bargaining. In fact, everything of importance is predetermined in the plan, and among other things, the cost of labor and consequently the wage bill. Labor legislation in Central and Eastern Europe has strictly followed the Soviet example in this respect. Collective agreements must be based on technically determined standards of output, wage rates for piece work, standards of piece work, and differential working time fixed centrally by competent government agencies. The Hungarian Labor Code of 1951 prescribes (Section 8): " Basic principles relating to the conclusion of the collective agreement are established by the competent minister in agreement with the trade union." [38] Similarly, workers'

[37] *Sobranie Postanovlenii i Rasporiazhenii Soveta Ministrov Rossyjskoi Sovetskoi Federativnoi Socialisticheskoi Respubliki* (1949), No. 2, Decision No. 16. See: Polish Law on Planned Contracts, April 19, 1950 (*Polish Laws* [1950], No. 21); Hungarian Decree on Delivery Contracts, September 6, 1949 (*Hungarian Laws* [1949], No. 4226); Czechoslovak Statute on the State Industrial Enterprises (Supplement to No. 44, *Czechoslovak Laws* [1949], sections 155ff.).

[38] Hungarian Labor Code (*Hungarian Laws* [1951], No. 7); Czechoslovak Law on Industrial Enterprises; Rumanian Labor Code (*Rumanian Laws* [1950], No. 3); Yugoslav Law on the Organization of State Enterprises (*Yugoslav Laws* [1946], No. 62).

participation in working out the shop rules is purely nominal, as again shop rules of individual enterprises must be based on model regulations prepared by the competent economic ministry.[39] One of the Soviet experts in the field of labor relations thus explained the new trend in the labor legislation of people's democracies:

> "In countries of people's democracy, labor organization and wages are put on a scientific basis after the example of the Soviet Union. . . . [a scientific basis is provided by the fact that social labor relations are in fact] material relations independent of human will . . . People cannot exist without producing the means of their existence. . . . The material character of social labor relations consists in their dependence on the level of development of the productive forces; qualitative changes in the level of their development unavoidably result in changes in social-labor relations."[40]

The direct dependence of workers' earnings on the results of their labor is scientifically reinforced by a system of incentives, bonuses, progressive pay increases and benefits from directors' funds, leave funds, or "workers' funds" as they are called in the laws of people's states. If various systems of pay in the socialist world are still directly related to the results of the labor of each individual worker, and are, therefore, of general application, workers' funds are operated on the principle of selection. Benefits are not distributed according to the individual contribution to the results of production, but are a source of reward for agitators, political activists, and the like. At the same time, economic theories of Marxian socialism are indissolubly linked with the monistic theory of value. Everything which is distributed in society, i.e. the sum total of the social product, is the exclusive result of the worker's labor. The value which he has produced, minus deductions to meet expenses needed for continued production (e.g., to pro-

[39] Gsovski, *op. cit.*, I, 797; also Gsovski, *Soviet Labor Law* (U. S. Department of Labor, Bulletin No. 1026), p. 5.

[40] Aleksandrov, *op. cit.* (n. 1, *supra*), p. 7.

vide for capital accumulation, to pay for social services, etc.) belongs to the worker.[41] Funds are part of these deductions, and in so far as they undercut the general rate of pay, affect every class of workers, in particular the wages of workers who fail to achieve the average rate of output. In fact, therefore, a double system of reward is in operation, which emphasizes still more the difference between those who lag behind, and those able and willing to achieve a higher output, and gifted with an understanding of the political significance of the worker's labor.

In labor law, which represents the core of legal regulation regarding personal relations between men and the state, the principle of status prevails. A worker is represented by the trade union in relations with his employer, whether he is a member of the union or not. Direction of labor, employment by an administrative act;[42] labor reserves based on conscription of labor; freezing on the jobs; the right of management arbitrarily to transfer a worker from one establishment to another,—all of these exclude the element of contract, as a determinative of personal rights and obligations. Under socialist labor law, the individual is not the unit of which the law takes account. He is integrated into a larger association which operates for him. His rights and obligations are determined by his status within this larger association.

In the socialist legal, economic, and government system, contract represents one of the examples of the total adaptation of an institution to new conditions. Its new function is expressive of principles and ideas foreign to its original concept. Socialist contract in both the mechanism of the national economy and in labor relations is identified with administrative regulation. It could just as well be replaced by a system of orders and instructions. Its usefulness lies in the fact that the economic machinery depends on the cooperation of vari-

[41] Marx, *Critique of the Gotha Programme* (new ed., New York, 1938); Lenin, *Sochinenia,* XXI, 443.

[42] Gsovski, *op. cit.,* I, 800-1.

ous state organizations not integrated in a clear-cut hierarchical order of jurisdiction, which makes administrative regulation tedious and impracticable. For the rest, contract is used to screen bureaucratic rule in all those fields which in the theory of socialist government belong to the exclusive jurisdiction of the people.

KAZIMIERZ GRZYBOWSKI

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THE UNITED NATIONS AND OUR INTERAMERICAN SYSTEM *

IT is a well known fact that in the course of many centuries statesmen and lawyers from practically every nation have devoted a great deal of attention to one of the most absorbing and baffling problems of the world: to insure the maintenance of peace through a system of collective security.

Nations have rallied together in time of danger. Alliances have been formed for common defense, and not infrequently to promote the selfish interests of their partners and to facilitate the fulfilment of imperialistic designs. In the same way that a sword may be used for either defense or attack, the gathering of nations has constituted in the past either a safeguard of international order or a menace against peace.

As time goes by, wars between nations have become more and more deadly. The toll of lives and the number of mutilated victims of the two world wars, as well as the material damage, have been so great that there is not any parallel in history for such carnage and destruction. There is less faith now in the efficacy of international cooperation for the maintenance of peace than there was at the end of the first world war. Those persons who were able at that time to observe the mental and emotional reactions of peoples, as reflected in the accounts given by the press of the world, could not but realize that in spite of the deep feelings of horror and insecurity produced by the cruelty and ravages of the war, there was in every country, and particularly in those that had suffered most during the bloody strife, a grim determination to make it impossible that any other war between nations should ever

* An address by the Ambassador of El Salvador to the United States of America, delivered at the final meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., on May 19, 1953.

happen. There was a longing for peace in every heart and the governments of the world understood clearly that the task of establishing effective means to preserve international order and to afford greater security to their peoples had become the most important mission entrusted to them.

The League of Nations was born and its main purpose was to promote peace. It may be said to the credit of this great international organization that, through its system of mandates, it helped many countries to achieve independence and to become active members of the community of nations. It brought also into being many international compacts which restricted the narcotic trade, established barriers against white slavery, promoted sanitation, advanced culture, and gave to the world a Permanent Court of International Justice for the peaceful settlement of disputes. May I say in passing that such a Court was the second permanent international tribunal that has ever existed in the world? To the Central American Republics of El Salvador, Guatemala, Honduras, Nicaragua and Costa Rica corresponds the distinguished honor of having established for the settlement of their controversies the first permanent International Court that has been in existence. It lasted only ten years, from 1907 to 1917, but it is, nevertheless, the first undertaking of this nature which ever came into being in our restless world.

In spite of all its achievements, the League of Nations failed in the fulfilment of its main purpose, which was the promotion of international peace and security. Rivalries and territorial ambitions which divided the nations of the world rendered that instrument ineffective; and as a result of the Second World War both the League of Nations and the Permanent Court of International Justice were totally liquidated. It was necessary, however, to create substitutes for them in order to satisfy the needs and to carry out the purposes for which they had been established. A Conference on International Organization was held in San Francisco, California, from April to June, 1945, and a Charter was adopted for a new Organiza-

tion which was called the United Nations. A Statute for an International Court of Justice was likewise adopted.

Students of International Law have debated and will continue to discuss in many years to come the relative merits of the League of Nations and of the newly established Organization of the United Nations. The causes which led to the failure of the League will be recounted again and compared with the undermining effects which the veto power, the weak support from several Member States, and internal division of the whole organization are producing in the United Nations. It is not my purpose at this time to dwell at length upon this subject, but I feel that at least one important point should be now stressed. The Covenant of the League of Nations was prepared after the termination of the First World War by the Peace Conference at Paris in 1919 and it was made an integral part of the Treaty of Versailles, and in general of the peace treaties of that year, all of which contained special provisions for the disposition of those territories which were removed from the jurisdiction and authority of the vanquished nations. Such territorial disposition made it possible for the Peace Conference to adopt the text of Article X of the Covenant, which established a definite guarantee of the territorial integrity and the political independence of the Members of the League. It simply meant that no further territorial changes were expected by the victorious nations and that it was regarded as essential for the future peace of the world to safeguard the freedom and the territorial integrity of all those States who were ready and willing to cooperate as Members of the League in the preservation of international order. The situation which prevailed at the time when the Charter of the United Nations was adopted in San Francisco, California, was entirely different. The Second World War had not yet been finished and it was clear that territorial changes had to be expected at the end of the struggle. As a result, the Charter does not contain any provision which guarantees the territorial integrity of the Member States of the Organization.

Had it not been for this omission, Poland might have been able to preserve its territorial integrity from the rapacity of the Soviet Union. We all know that the Second World War was started in order to defend Poland against the nazi aggression; and yet, at the end of the war, Poland, which was listed among the victorious nations, lost forty-five percent of her territory to the Soviet Union which was one of her allies. How right was the last Ambassador of free Poland, accredited to Washington, Jan Ciechanowski, when in giving us this very sad story, he entitles his book " Defeat in Victory "!

The United Nations is at present the only Organization of an almost world wide scope which is engaged in the task of insuring peace among all nations of the earth; and so it deserves the full cooperation of all peace-loving peoples. In spite of its handicaps, of which I have enumerated some, it has made it possible for a number of countries to acquire independence under its auspices, continuing in this manner the work of its predecessor, the League of Nations. It has made very constructive efforts to insure the respect for fundamental human rights, and in addition it has obtained success in many other lines of endeavor, such as the negotiation of international pacts, including the Convention on Genocide and many others.

The American Republics have a system of their own, which is much older and has been more fruitful than any of the two world organizations which I have mentioned. It had its origin in 1880 when the First International Conference of the American Republics was held in Washington. It is founded upon the principle that all these Nations have equal rights; and, as a consequence, they have the same voting power in all its organs. This is in full contrast with the Security Council of the United Nations where the voting power, in a most striking manner, is unequally divided among its members. As early as 1933, the American Republics represented at their Seventh International Conference signed in the City of Montevideo a Convention on the Rights and Duties of States, which

is undoubtedly the most important result of the work of that Conference. Article 11 of this Convention has the following text:

> "The Contracting States definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force, whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a State is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State, directly or indirectly, or for any motive whatever, even temporarily."

The importance of this provision cannot be over-estimated. It is a definite guarantee of the territorial integrity of the Member States of the Inter-American System. It is at the same time a great and positive achievement leading towards the maintenance of peace and goodwill among the Nations of the Western Hemisphere.

Another important provision of the Convention on the Rights and Duties of the States is embodied in its Article 8, which reads as follows:

> "Article 8. No State has the right to intervene in the internal or external affairs of another."

The Article which I have just quoted embodies a fundamental principle and a rule of conduct which the American Republics are bound to observe most faithfully. Their recognition has produced the happy result of dispelling fears and distrust in our Inter-American relations. They have established upon the most secure basis the confidence of each one of the American Republics in every one of the others. They constitute a most effective safeguard of the sovereign rights of each individual Nation.

At the time when the Charter of the United Nations was finally drafted, the American Republics, through their Delegations to the Conference on International Organization which

met at San Francisco, California, in 1945, made it quite clear that they regarded it as essential to write into the Charter an appropriate recognition of the principle of non intervention. Such recognition was made in paragraph 7 of Article 2 of the Charter.

Another important achievement of the American Republics is the recognition of the Regional System in the Charter of the United Nations. In this manner, they have not given up the structure of our Inter-American System nor the principles upon which it is based. In addition, the right of joint defense against aggression has been recognized as valid until such a time as the Security Council of the United Nations has taken appropriate action to cope with the menace.

There are in force in the American Republics several treaties and conventions which provide for their common defense against aggression. They have perfected a system of consultation which is set in motion when there is any menace to the peace; and the record of these Republics in the pacific settlement of their controversies is simply remarkable.

What I have said is enough to prove that we have every reason to be proud of our Inter-American System. It has lived effectively through a period of time which covers more than half a century. It was in operation before the League of Nations was established at the end of the First World War; and it outlived it. Now we are interested in the success and progress of the United Nations which we hope will become in the course of time a world organization with universal authority. This should not, however, weaken in the least our will to preserve and strengthen our Inter-American System which is perfectly compatible with the other and which has rendered heretofore most valuable services to all our Countries, and to the world at large, because of its great contribution to the maintenance of peace and international order.

May I take the liberty at this time to observe that the question of making peace secure for the world is closely associated with the need of affording proper education to the peoples of

all countries. In an address which I delivered at the George Washington University in 1936, when the International Conference for the Maintenance of Peace was about to meet in Buenos Aires, Argentina, I made the following statement:

> " To preserve peace is not a matter of words, or speeches, however brilliant they may be. Peace can only be permanent when there is a spirit of fraternity among men that makes it impossible for leaders or for governments to break it. It is necessary to develop a new conscience among men and among nations, founded upon those basic principles of the Christian Civilization that teach the individual to consider his fellow creatures as his brethren and to respect the rights of others in the same measure as he wants his own to be respected."

With this observation, which I think is now as timely as ever, I bring my remarks to a close.

I thank you.

Héctor David Castro

The Embassy of El Salvador,
Washington, D. C.

Notes and Reviews

A PRELIMINARY REPORT ON THE PROJECT OF A GENERAL HISTORY OF ROMAN LAW IN THE MIDDLE AGES

Editorial Note. The report which follows here in translation was received this autumn from Professor Erich Genzmer in Hamburg, Germany. It hardly seems necessary to stress the importance of the project hereinafter described. Savigny's monumental *Geschichte des römischen Rechts im Mittelalter,* published first in 6 vols. (Heidelberg 1815-31), and in a revised edition in 7 vols. (1834-51), remains a classic of incomparable value, but is of course antiquated in many parts by over a hundred years of scholarship since its completion. Not even specialists today can find their way through the maze of modern pertinent bibliography; many important studies and editions are tucked away in *Festschriften* and in volumes that are out of print for generations. Thus the project of a " New Savigny " to be produced by an international team of competent scholars will receive enthusiastic endorsement, not only of the cognoscenti, but in particular of the non-specialists who are in need of a tool of precise and up-to-date information on the history of Roman law and Romanistic writing in the Middle Ages.

In section II (2) below, the report touches upon the problem of languages. May it be hoped that our continental colleagues will raise their eyes beyond the waters of the Channel and the Atlantic to perceive the demand for still another version, " in order not to reduce by linguistic difficulties the circle of readers, which ought not to be confined to specialists "—in the English-speaking world?

Professor Genzmer's report follows:

I. *Beginnings and First Organization of the Project*

At the Congress of the *Société d'Histoire des Droits de l'Antiquité* in Florence, in September 1952, the plan was announced to create in common effort of European scholars a working tool for studies in medieval Roman Law (i.e., Roman Law after Justinian), designated

provisorily as "The New Savigny."[1] It was planned to have the enterprise sponsored by the *Société d'Histoire des Droits de l'Antiquité* under its president F. de Visscher, and to create the position of an editorial director (*wissenschaftlicher Leiter*), assisted by a committee of outstanding European experts.

In the course of winter, 1952/53, a committee was formed consisting of Professors F. de Visscher (Louvain), E. M. Meijers (Leyden), G. Le Bras (Paris), U. Nicolini (Florence) and E. Genzmer (Hamburg); a Spanish member to be coopted at a later date. The direction of the project was entrusted to E. Genzmer.

II. *The Meeting of the Committee on February 27/28, 1953*

The Committee convened in Brussels on February 27 and 28, 1953. M. Gibert had been invited to represent the Spanish legal scholars but was unfortunately prevented from appearing. The following topics were discussed:

(1) *Problem of Financing.* Mr. de Visscher reported that he had submitted a detailed exposé to the *Union Académique Internationale,* which in turn would contact its members, the Academies in the several countries. The President of the Union, Mr. Lugli, had given Mr. de Visscher the hope of some contribution, if the countries of the scholars who were chiefly to participate in the work would contribute as well. The thing to do now, Mr. de Visscher said, was to ask for such contributions by applying to the respective centres for the support of scientific research. He added that a Belgian contribution could be counted on.

Mr. Le Bras declared that certainly France, too, would make a contribution. Mr. Genzmer said that probably also the *Notgemeinschaft der deutschen Wissenschaft* would contribute.

Since primarily Belgium, Germany, France, the Netherlands, Italy, and Spain will participate in the project, it was resolved to ask each of these countries for a share in the total cost. The possible participation of England and Scotland was envisaged, and also, though for a smaller amount, that of other countries.

The Committee stated that it was not possible to offer the scientific collaborators remuneration for their work. The financial contributions were intended to cover the clerical costs and other auxili-

[1] *Archives d'histoire du droit oriental et Revue internationale des droits de l'antiquité,* N.S. 2 (1953), 431ff., 465ff.

ary services, the presumably considerable costs of translations, of travel to libraries and archives, as well as of travel to attend the sessions of the central Committee or meetings and discussions with collaborators, and the like. It was agreed that neither the central Committee nor the director could assume any financial liability in relation to the collaborators or otherwise.

The problem of choosing a publisher was reserved for discussion at a future session of the Committee, likewise the question whether a subscription ought to be opened. The possibility of a joint undertaking by publishers from the chief participating countries was noted.

(2) *Problem of Languages.* The Committee resolved that each collaborator would be allowed to write in the language of his choice. It should be attempted to bring out a German, a French, and an Italian edition of the whole work, in order not to reduce by linguistic difficulties the circle of readers, which ought not to be confined to specialists. Only if such a triplicate edition should turn out to be absolutely unattainable owing to the costs of translating and printing, would the substitute of a single edition be chosen. The individual contributions would then appear in German, French, or Italian; if need be, after translation from other languages used by the respective collaborators.

There was unanimous consent that every effort should be made to achieve a uniform terminology in the different languages.

(3) *Problem of the General Title.* It was proposed and resolved to call the project "General History of Roman Law in the Middle Ages." This formulation is to be taken as Heinrich Brunner understood it, who showed long ago that both logically and in substance the traditional division into an "external" and an "internal" history of law is untenable and merely based on the false interpretation of a terminology established by Leibniz.[2]

The Central Committee considered as highly desirable the publication of Prolegomena prior to the complete work itself, perhaps in the form of periodical articles.

(4) It was resolved not to include the history of post-Justinian law in Byzantium and Eastern Europe.

[2] Cf. Taranowsky, in *Zeitschrift der Savigny-Stiftung,* Germ. Abt. 27 (1906), 190-233.

(5) As for the general layout of the projected work, the proposal made in 1952 by E. M. Meijers, and the draft based on it, as submitted by E. Genzmer, were adopted on principle. It was, however, resolved that the work should consist not of four but of five parts, to which an index volume was to be added. The projected division of the work (with two small modifications added in Florence) will be found at the end of this report.

(6) As regards the further proceedings, the Central Committee envisaged a new meeting in October 1953. (In the meantime, it proved preferable to have this session postponed to March or April 1954). The members of the Committee took upon themselves the task of inviting collaborators for the individual sections. (In the meantime, collaborators for most of the sections have been engaged, as appears from the names given at the end of this report.) It was resolved that the definitive assignments should be made by Mr. Genzmer, in his capacity as editorial director, in permanent contact with the members of the Committee.

The goal to be kept in sight is not a collection of single articles but a unified, balanced, single work. At the next session of the Committee general directives for the form and style of the contributions will be formulated.

It was expressly stressed that the collaborators are expected not so much to perform new researches, as to describe the present state of scholarship. This task includes a detailed account of previous investigations and possibly complete bibliographies. But the Committee saw clearly that in certain fields new researches are necessary. In the articles dealing with individual jurists of the Middle Ages, attempts should be made to find new material, for instance, by inquiries in local Italian archives.

(7) *Scientific Responsibility of the Collaborators.* The Committee agreed that each collaborator would himself be fully responsible for his contribution. His authorship should find expression also in the external appearance of the volumes, for instance, by placing the author's name in the running head of the page. On the other hand, the editorial director and his committee would be responsible for accepting only articles that are in keeping with the scientific standard of the project; for unity in purpose and character of the single articles; for the avoidance of gaps and overlappings. The directing

committee would try to reconcile any differences of opinion; if such were not attainable, the differences would simply be stated, eschewing however all sharpness of polemic.

III. *The Conversations Held in Florence on April 26, 1953*

The meeting of the Committee in Brussels was followed by conversations in Florence on April 26, 1953, prepared by U. Nicolini, between E. Genzmer, Nicolini and several Italian colleagues, viz. Professors Calasso, De Vergottini, Astuti, Paradisi, Mor, Prosdocimi and Gualazzini.

E. Genzmer, on behalf of the Committee, greeted the persons present and thanked them for their coming and their interest. He discussed the following points:

The title "*General* History of Roman Law in the Middle Ages" was intended to express that the object of the work is not the special history of the single legal institutions, legal rules, and doctrines of the Middle Ages as such, and, so to speak, for their own sake. Such a History, he said, would be a goal unattainable for a long time. It is true that in those parts of the work that are to deal with the practical operation of the law, it will not be feasible completely to disregard this so-called internal history of the law; and in certain cases it will be useful to point, *exempli causa*, to the history of some legal institution during one or the other epoch in one or the other country. Only gradually can it become apparent how much is possible and necessary in this respect.

Then Mr. Genzmer touched on the difficulties which might arise with regard to the proper balance and unity of the work. For one, the various historical periods in the different countries are often uneven in character; secondly there will be diversity of opinion between the single collaborators about methods, philosophy of history, and general outlook, since every scholar has his own scientific personality. The thoughts of one scholar may attain their goal "sull'ali dorate"; the thoughts of another one may develop step by step from the single historical data investigated. The scientific independence and responsibility of each collaborator should not be prejudiced, and the project ought to leave room for individuality. Many a difficulty may be practically solved as the work proceeds. Also the necessity of being brief will help; the total length of the work is not to be exactly estimated today but ought to be kept in reasonable bounds.

Of course the " New Savigny " can not and must not aim at bringing research in the field forever to an end; it is intended as being only a new step, whence research will go on.

All persons present participated in the ensuing discussion. The question (raised first at the Congress in Florence, 1952, by Mr. Hoetink) whether, instead of a new complete work, one should not be satisfied with notes and additions to Savigny, to be perhaps published in a special magazine, was discussed again, but abandoned. Such merely complemental and corrective notes would not facilitate full bibliographical information, at present scarcely to be obtained; moreover, instead of promoting the very desirable extension of the knowledge of Roman law in the Middle Ages, such notes would be of interest only to a small circle of specialists.

F. Calasso (Rome) found much approval in emphasizing the need for a " philological " working method, as the best means to attain the desired uniform character of the work, for there were doubtless great difficulties in the path of productive cooperation between scholars of different nationality, training, and orientation.

Referring to his lecture in Florence, 1952, Calasso said that work in the history of the Italian, the French, the Spanish, and the other national laws was more important than the creation of a " New Savigny," because these laws were historical realities. The " New Savigny " might be a good working tool, a starting point, a useful inventory—provided that it were conceived as a " pura storia filologica," i.e., a description of the different schools, methods, authors, works, manuscripts, and so on. This would give unity and purpose to the collaborators.

Mr. Genzmer replied that it had been necessary to divide the complete work by chronological, not geographical units, and that this was required by the European character of the work, unanimously agreed upon in Brussels. A collection of legal histories of the various countries was something different, and neither could such histories be confined to Roman law and its share in the development. The national or municipal laws, in contrast with the universal Roman law, would find a place in the project merely under the special points of view deriving from the history of Roman law in the Middle Ages. But the project would in fact be of great significance as one of the foundations for research in national histories of law.

In reply to a question, Mr. Genzmer declared that the general outline of the work could not be changed by the present meeting in its principal features, because these had been established by the Central Committee in Brussels, but that the possibility of improving particulars had been expressly reserved.

G. Astuti agreed in general with the remarks by Calasso. The work should be dedicated in the first place to the " external " history of law, i.e. to the history of legal science, the bibliography, the editions, the manuscripts, etc. On the other hand he commended an extension beyond the Middle Ages. Mr. Nicolini agreed with him, declaring that he wanted the work to cover the time up to, but exclusive of, the national codifications.

Mr. Genzmer recalled the fact that the project provided inclusion of the beginnings of the humanistic school and its influence in the different countries. But in his opinion it was better to leave later periods to the individual national histories of law, in which, with the exception of Italy, the non-Roman elements played a large, though not everywhere equally large part.

B. Paradisi dealt with the practical difficulty of elaborating at the same time a " philological " history of sources and a " general " history.

C. G. Mor was of the opinion that it is impossible to draw a distinction between the practical operation of law and learned jurisprudence; i.e., betwen general history and history of the sources in the early (high) Middle Ages. For this period it would be necessary to examine all aspects of Roman law, its influence on Canon law and vice versa, on the law of the Langobards and so on. He deemed it advisable that for each period only one scholar should investigate all aspects of Roman law, the extent of knowledge of the Justinian law texts, the use of these texts in the practice, and so on.

U. Nicolini agreed with Mor and stressed that these considerations applied to the whole of the Middle Ages: the practice, the doctrines, the schools, the methods must all be investigated in their interrelation if we want a work that corresponds to the historiographical problems and trends of the present time. If we reject the outdated conception of an " abstract " history of Roman law, which

sees this history merely as a process of construction and interpretation; and if we believe that Roman law ought to be investigated in its relation to the particular laws, we must oppose the confining of the " New Savigny " to a philological history. The General History of Roman Law in the Middle Ages ought to be the history of the main stream among the several currents that moulded the medieval legal world; it ought to be the history of the Roman law which owed its predominant place to its technical thoroughness and its wide diffusion. It furnishes the standards for an adequate investigation of the particular legal orders of the Middle Ages.

The " New Savigny " will give an opportunity of exploring the relations between the *ius commune* and the particular laws. It ought to be a " General History " not in the sense of a complete history or of a history of all legal institutions, but in the meaning of a history of Roman law seen in a general manner, i.e., considered with regard to legal customs, and to the various ways in which it was operative: direct authority, authority by virtue of formal " reception," subsidiary authority, authority based on legal doctrine and writings. Its place in the general system of legal sources, and instances of its penetration into the particular laws are to be studied. The difficulties stressed by Mr. Calasso and others should by no means be neglected. But the danger of discrepancies between the several contributions could be overcome by contact between the collaborators and the good offices of the central directorate. (And, for that matter, the danger of discrepancies would occur also with a merely external or philological history.)

Not even Savigny's original work, Mr. Nicolini pointed out, was a purely philological history. A history written today of the sources, the legal writings, and the schools should still be less so. And a " General History " of Roman law would have to explore select fundamental problems of private, public, and penal law, as well as the relations between Roman law and the other elements of the legal order in force in the different European countries during the Middle Ages.

Mr. Genzmer expressed again his confidence that many of the diversities of opinion would find of themselves their solution in the course of work on the project, and all persons present declared that they were willing to collaborate. Mr. Calasso undertook—in addi-

tion to his contribution on the Postaccursiani and on Cinus, Bartolus, Baldus, their contemporaries, and the Bartolists—to write for Part V of the work either a general introduction or a conclusion.

With a brief address of thanks by Mr. Genzmer the meeting came to a close.

IV. *The Conversations in Paris of June, 1953*

In June 1953, at the meeting of the *Société d'Histoire de Droit*, Mr. Le Bras spoke to the French colleagues about the project and secured the assistance of several collaborators. Mr. Le Bras will report himself about the details at the Congress of Legal Historians in Barcelona.

V. *The Hope for the Collaboration of the Spanish Historians of Law*

It is likewise hoped that at the Congress of Barcelona the participation of the Spanish historians of law, which is very important for the success of the project, will be secured.

VI. *General Arrangement of the Work*

The program of the complete work, as adopted in Brussels, and with the minor modifications voted in Florence, follows here. The names of collaborators given in this outline are tentative and imply rather possibilities existing at the present time than any definitive obligations.

Part I

General Introduction. Plan and purpose of the work. Sources and auxiliary tools of research in general .... Genzmer (Hamburg)

Roman Law in the Middle Ages before Irnerius

1. *The Age of Justinian.*
   a) General situation and legal situation in Italy, France, Spain N.N. (author still undetermined)
   b) The *Corpus Juris* introduced in Italy by way of edicts. *Sanctio pragmatica pro petitione Vigilii.* Influence on the law in the daily practice. Use of Roman law in the *Leges Barbarorum,* by the clergy, other uses. Roman law and the Fathers of the Church ..... B. Paradisi (Naples) ?

c) Romanistic writings in Justinian's age. Writings on Justinian's codification. Writings on the *Breviarium Alarici*. Collections for the use of the Church. Other writings, including apocrypha ..... C. G. Mor (Modena)

2. *From Justinian to about 1000 A.D.*
   a) General situation and legal situation. Diffusion of the *Breviarium Alarici* and the parts of the *Corpus Juris*. Other sources known: writings of ancient jurists, imperial constitutions, non-legal literature. All to be treated separately for:
      aa) Italy, including the Byzantine regions ..... Paradisi
      bb) France ..... N.N. (a French scholar)
      cc) Spain ..... N.N. (a Spanish scholar)
      dd) England? ..... N.N.
   b) Writings of the early Middle Ages ..... Mor
      aa) Writings on Justinian's codification.
      bb) Collections for the use of the Church in Italy.
      cc) Writings on the *Breviarium*.
      dd) Collections for the use of the Church in France.
      ee) Writings on the Germano-Romanic laws (Italy, Frankish empire, Raetia, Provence, Spain).
      ff) Apocrypha and forgeries.
      gg) Writings on pre-Justinian law.

      (For (cc) and for the end of (ee) a French and a Spanish scholar.)

3. *The Transitory Period from 1000 to 1100 A.D. in Italy, France, and Spain.*
   a) General situation and legal situation.
   b) The *Breviarium* and the *Corpus Juris* in Italy, France, Spain.
      Roman customary law ..... Leicht (Rome) and Mor?
      Lombard law ..... Vaccari (Pavia)
   c) Romanistic writings
      aa) On the *Corpus Juris* ..... Leicht and Mor?
      bb) Canonistic writings in Italy and France (prior to Gratian) ..... N.N. (a French scholar)
      cc) Romanistic writings on Lombard law and Lombard writings on Roman law ..... Vaccari
      dd) Writings of the Ravenna group ... Crosara (Camerino)
      ee) Other writings ..... N.N.

4. *Teaching of Law in the Early Middle Ages and in the Transitory Period in Italy, France, Spain.*
   a) Trivium and Quadrivium.
   b) Practical training in law for apprentices of practitioners. Teaching of law in ecclesiastical schools and in the ecclesiastical practice. Teaching of law in secular schools?
      Gualazzini (for Italy); also a Spanish and a French scholar
   c) The Lombard law school ..... Vaccari (Pavia)
5. *Concluding remarks* ..... Genzmer

Part II

The Universities

1. The rise of learning before and around 1100 A.D.; its spiritual, political, and social background. The development of the cities and of city culture in Italy, France, Spain. The advance of education and philosophy. The reports on a law school in Rome. The reports on a law school in Ravenna.
2. The influence of the idea of a university on the study of Roman law.
3. The methods of teaching. *Reportationes.*
4. Influence of the other sciences on the study of Roman law; particularly the influence of grammar, rhetoric, philology, theology, Canon law on the methods and forms of writing employed by the glossators. Models of instruction from the schools. Connections with scholastic philosophy and rhetoric in court, with the Decretum and the Decretals. Relations between the Legists and the Canonists. Purpose and function of the juristic writings of the glossators.
5. Books: Method of production and diffusion. The *stationarii.*
6. The students.
   (1-6) ..... N.N., eventually Genzmer
7. The single universities from 1100 to 1500, divided by countries; their organization, with a bibliography for each university
   Gualazzini, and one English, one French, and one Spanish scholar

Part III

The Glossators and Their Writings from Irnerius to Accursius

1. Broadening of the knowledge of sources and decline of the use of the *Breviarium. Decima collatio. Libri Feudorum. Pax Constantiae.* The Spanish legislation
   Leicht, De Vergottini (Bologna) and a Spanish scholar
2. The literary forms employed by the glossators (glosses, *distinctiones, summae, questiones, brocarda, tractatus,* collections of *dissensiones*) *Ars notaria* ..... Genzmer
3. a) The individual glossators from Irnerius to Accursius, and their writings ..... Genzmer and Prosdocimi (Siena)
   b) The canonists from Gratian to the Decretals of Gregory IX ..... N.N.
4. Anonymous and pseudepigraphed writings
   Rota (Sassari) and others
5. Legal writing in France, including the Provence. The Tubingen lawbook and its circle. *Brachylogus. Epitome exactis regibus. Lo Codi,* etc. ..... N.N. (French scholars)
6. Romanistic work and influences of Canon law in Spain and Portugal ..... N.N. (Spanish scholars)
7. Romanistic work and influences of Canon law in England and Scotland ..... for Scotland: T. B. Smith (Aberdeen)
   for England: N.N.
8. The school of the Glossators in retrospect. Scientific character. Its accomplishments and its defects. The "library" of the Glossators ..... Genzmer

Part IV

From Accursius to the Bartolists

1. The Postaccursiani prior to Cinus ..... F. Calasso (Rome)
   In each of the following sections (2-6) the doctors, their aims, methods, and writings will be dealt with:
2. The law schools of Orleans and Toulouse .... Meijers (Leiden)
3. The law school of Vercelli, Padua, Modena;
4. The law school of Naples ..... Meijers
5. Cinus and his contemporaries;
6. Bartolus and his contemporaries;
7. Baldus and his contemporaries;
8. The Bartolists and their writings ..... Calasso
9. The Canonists after the Decretals of Gregory IX ..... N.N.

Part V

Influence of Roman Law and Its Science on Canon Law and the National Laws

1. General introduction (or concluding remarks?) ..... Calasso
2. Roman and Canon law and their mutual influence from Gregory IX on ..... N.N.
3. Italy.
   The communal epoch and the Signorias. Common (Roman) law and particular laws. Legal science and legal institutions
   U. Nicolini (Florence)
   Common (Roman) law and particular laws in the Kingdom of Naples and in Rome (Pontifical States)
   for Naples: R. Trifone (Naples);
   for the Pontifical States: Ermini (Perugia)
4. France (to about 1500 A.D.) ..... N.N.
5. Spain (to about 1500) ..... N.N.
6. The Netherlands and Belgium to about 1500 ..... N.N.
7. Germany (to about 1500) ..... Coing (Frankfurt)
8. Austria, Bohemia, etc. (to about 1500)
   Steinwenter (Graz) and Baltl (Graz)
9. Switzerland ..... N.N.
10. England and Scotland (to about 1500)
    Smith (Aberdeen) and N.N.
11. Denmark, Sweden, Norway (to about 1500) ..... N.N.
12. The beginnings of the humanistic school and its consequences in the different countries ..... Astuti (Turin)

* * * * *

Collectio bibliographica operum ad Romanum pertinentium, series I, vol. 2-3, by L. Caes and E. Hermon. Brussels, Office International de Librairie, 1951. Pp. 944.

The double volume is the second instalment on the great project of providing a complete bibliography of Romanist literature of the nineteenth and twentieth centuries, on which the undersigned reported in Seminar 9 (1951) 103f. Being a continuation of the first and most important series of the whole work (the series being entitled: Opera edita in periodicis miscellaneis encyclopaediisque), the new volume, in addition to bringing vol. 1 (Italian, French, and Dutch publications) up to date, displays articles published in German language periodicals and encyclopaedias down to 1950. Its scope is very large. As far as the subject matter is concerned, it embraces not only Roman law, but the whole of ancient legal history including Egyptian, cuneiform, Greek, Byzantine and ecclesiastical law (unfortunately medieval Roman law is not included); as far as publications are concerned, it gives a full account of numerous legal, philological, and historical journals (or, in addition to those indexed or evolved to ancient legal history. The method is the familiar one as described in the previous review. Some mistakes did occur. Thus we find listed as a work of *J. Partsch*: "Palmyra. Eine nordsyrisch-klimatische Studie" (Ber. Sächs. Ges. der Wiss. 1922), actually the earlier professor of geography in Leipzig, was the father of the Romanist. More of the sort might possibly be found. However a few minor slips and occasional oversights do not impair the usefulness of the work, and the two editors are to be congratulated on the successful progress of their tremendous enterprise which goes a long way toward facilitating research in the fields covered by it.

Hans Julius Wolff

University of Munich

A NEW DICTIONARY OF ROMAN LAW

The editors of SEMINAR wish to congratulate Professor Adolf Berger, of the French University (École Libre des Hautes Études) and the City College of New York, on the completion of his monumental *Encyclopedic Dictionary of Roman Law,* published in September 1953 by the American Philosophical Society at Philadelphia as Volume 43, Part 2, of its *Transactions* (478 pp. quarto, $5.00). The work was begun in 1946 and patiently carried on by its author while all the time a remarkable output of studies, papers, and reviews came from his pen—not a few of which have appeared on the pages of this magazine—; yet he was able to complete the Dictionary and see it through the press in little more than six years.

A detailed review will be published in SEMINAR, vol. XII (1954). But the editors wish, as of today, to express their conviction that the Dictionary will be hailed at once as an indispensable tool of research by students and scholars alike. Not the least of its merits is the excellent bibliographical information given with the majority of the individual entries as well as in the 23 pages of General Bibliography at the end.

ARGENTINE SOCIETY OF ROMAN LAW

Information has been received recently concerning the establishment of the Argentine Society of Roman Law (Sociedad Argentina de Derecho Romano). The Society has been incorporated, with its seat in the City of Córdoba, Argentina.

Dr. Agustín Díaz Bialet is President of the Society; he is being assisted by a Council consisting of seven members. The purposes of the Society, as stated in its statutes, are: (a) scientific investigation of Roman Law in its historical aspects as well as in its application to modern legal systems, particularly the Argentine legal system; (b) cultural dissemination of these two aspects of Roman Law studies; (c) establishment of connections between the Society and similar associations in foreign countries and coordination of their activities in accordance with the objectives of the (Argentine) Second Five Year Plan for private scientific associations.

The Society plans to hold annual meetings, to establish branches at other Argentine universities and to publish a periodical, *Revista de la Sociedad Argentina de Derecho Romano.*

The editors of SEMINAR congratulate Professor Díaz Bialet and his associates on the foundation of the Society, with all good wishes for a long, successful activity. Q.F.F.F.S.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Academic Year 1952-1953

Concilium:

A. Arthur Schiller, A.B., A.M., J.D., Dr.jur.h.c., Professor of Law, Columbia University, *Magister.*

William H. Roberts, J.U.D., Assistant Professor of International Relations, The Catholic University of America, *Scriba.*

Brendan F. Brown, D. Phil. (Oxon), LL.M., J.U.D., Dean, School of Law, The Catholic University of America, *ex officio.*

Rev. Clement V. Bastnagel, J.U.D., S.T.L., Associate Professor of Canon Law, The Catholic University of America, *ex officio.*

Franklin F. Russell, M.A., B.C.L. (Oxon), J.D., Member of the Bar of the District of Columbia.

Stephan Kuttner, J.U.D., S.J.D. (Bonon), Professor of the History of Canon Law, The Catholic University of America.

Papers read at the Meetings of the Seminar:

October 28, 1952: Dr. Stephan Kuttner: "Pope Honorius III and the Study of Roman Law."

December 12, 1952: Dr. K. Grzybowski, Mid-European Law Project, Library of Congress: "From Contract to Status."

April 28, 1953: Dr. George Torzsay-Biber, Mid-European Law Project, Library of Congress: "The Hungarian Lawyer and Roman Law."

May 19, 1953: Dr. A. Arthur Schiller: "Factors in the Development of the Late Classical Law."

Concilium elected for the Academic Year 1953-1954:

Stephan Kuttner, *Magister.*

William H. Roberts, *Scriba.*

Brendan F. Brown, *ex officio.*

A. Arthur Schiller.